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# The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records

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## THE IDEA OF ADOPTION: AN INQUIRY INTO THE HISTORY OF ADULT ADOPTEE ACCESS TO BIRTH RECORDS

*Elizabeth J. Samuels\**

*There is intense debate taking place around the country about whether to open birth records to adult adoptees. Our understanding of the legal history relevant to this debate is incomplete and inaccurate. This Article provides a more accurate history of adult adoptees' access to birth records, and it uses that history to analyze what has been a complex relationship in this area of law between legal rules and social attitudes. The analysis traces how social attitudes and understandings have likely affected the construction of rules, how rules in turn appear to have affected attitudes, and how, finally, attitudes may have extended and perpetuated rules.*

In 1942 I had gone to the Probate Court . . . and looked up my first adoption paper, and saw my mother's full name signed by her own hand. There was no rigmarole then; you were allowed to see your own paper in a kindly procedure.<sup>1</sup>

—Jean Paton, Adoptee.

[E]very person has a right to know who he is and who his people were.<sup>2</sup>

—Maud Morlock, U.S. Children's Bureau, 1946.

### I. INTRODUCTION

A history of adoption law has not been available that is complete

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1. RUTHENA HILL KITTON, ORPHAN VOYAGE 51-52 (1968) (author also known as Jean Paton).

2. Maud Morlock, *Wanted: A Square Deal for the Baby Born Out of Wedlock*, 10 CHILD 167, 168 (1946). The author was a consultant in Services for Unmarried Mothers, Social Service Division, U.S. Children's Bureau. *Id.* at 167.

and accurate enough to properly inform the current debate over laws that seal birth records from inspection by adult adoptees. Those unfamiliar with the subject often mistakenly assume that adoption has always been a part of American law and that, in cases in which birth parents and adoptive parents are strangers, the law has always kept these parties' identities a secret from one another and has always kept adoptees from learning the identity of their birth parents. Those acquainted with the best informed sources understand, to the contrary, that adoption only became part of American law in the late nineteenth and early twentieth centuries,<sup>3</sup> and that adoption procedures initially established by state statutes provided neither for confidentiality with respect to the public nor for secrecy among the parties, but were subsequently amended to protect the parties from public scrutiny.<sup>4</sup> The sources do not provide a clear picture, however, of the ultimate development of the regime of secrecy among the parties. Instead, they communicate a substantially flawed account, one that conflates sealing original birth records from inspection by adult adoptees with sealing court records from inspection by the parties and sealing birth records from inspection by everyone except adult adoptees.<sup>5</sup> Most sources misrepresent the timing and sequence of the process by which all of these measures became nearly universal. This

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3. A 1920 article reviewing the history and current status of adoption laws in the United States noted that "adoption is now general, but it was not until the middle of the nineteenth century that statutes changing the common law so as to permit it were enacted, Massachusetts in 1851 being the first of the common law states so to legislate." John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 335 (1922). "[B]y 1929 every state had enacted some type of adoption legislation." DOROTHY ZIETZ, *CHILD WELFARE: PRINCIPLES AND METHODS* 133 (1959). For other discussions of early U.S. adoption laws, see Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971).

4. See, e.g., 2 JOAN HEIFETZ HOLLINGER ET AL., *ADOPTION LAW AND PRACTICE* § 13.01[1] (2000).

5. See *infra* notes 26-34 and accompanying text. Accounts also tend to conflate and confuse the subject of the sealing of court and birth records with the availability of information in adoption agency records. Some states passed laws sealing the case records of public agencies, or of both public and private agencies, at the same time or at a different time from the passage of laws concerning court or birth records, but other states never passed laws concerning agency records. E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 183-85* (1998). The history of the confidentiality of agency records is beyond the scope of this Article, although it is mentioned below in connection with discussion of reasons for closing original birth records to adult adoptees. That history is analyzed in a recent study by historian E. Wayne Carp, which is based on an exhaustive examination of contemporary materials, including not only professional journals and the files of the U.S. Children's Bureau and the Child Welfare League of America (a privately supported national organization), but also the annual reports and correspondence of child-placing agencies in different states and the 21,500 adoption case records of the Children's Home Society of Washington (a private agency founded in 1894). *Id.* at xi-xii.

Article provides a new and more accurate account of the sealing of birth records. It then uses that account to explore, in a more nuanced way than formerly possible, a complex relationship in this area between law and society, between legal rules on the one hand and social attitudes and understandings on the other. This exploration entails venturing into territory where certain, definite answers cannot be found but where speculation is both possible and fruitful.

The widely accepted account of when adoptions in America became cloaked in secrecy goes something like this. Early in the twentieth century, states began moving toward protecting the privacy of participants in the adoption process by closing court records to public inspection.<sup>6</sup> Then, in the 1930s, 1940s, and early 1950s, virtually all states took the further step of imposing a unitary regime of secrecy under which adopting parents and birth parents who were unknown to one another would remain unknown and under which adult adoptees could never learn the identity of their birth parents.<sup>7</sup> While it is true that a small number of states closed original birth records to adult adoptees at approximately the same time they otherwise closed adoption records to the parties,<sup>8</sup> most states proceeded much more slowly with respect to adult adoptees' access to birth records.<sup>9</sup> In fact, as late as 1960, some forty percent of the states still had laws on the books recognizing an unrestricted right of adult adoptees to inspect their original birth certificates.<sup>10</sup> It was only in the 1960s, 1970s, and 1980s that all but three of those states changed their laws to close birth records to adoptees.<sup>11</sup> At the same time that those states

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6. See *infra* text accompanying note 26.

7. See *infra* text accompanying notes 26-34.

8. For example, New York, which may have been the first or one of the first states to close original birth records to adult adoptees, as well as to other parties and the public, see *infra* text accompanying notes 46-53, sealed court records in 1935 and sealed original birth records in 1936. The court records law specified that "[t]he written report of the investigation, together with all other papers pertaining to the adoption, shall be kept by the judge . . . [and] must be sealed by him and withheld from inspection . . . except upon an order of a court . . . on good cause shown." 1935 N.Y. Laws 860. The birth records law specified that when a new birth record has been made, "[t]he commissioner of health shall place the original birth record and the proof, notification and papers pertaining to the new birth record under seal. Seals shall not be broken except by order of a court . . ." 1936 N.Y. Laws 854. A small number of states sealed birth records from all inspection when court records were still available. Maryland, in 1939, provided that original birth records be sealed, and that "the seal not . . . be broken save by court order or by order of the Registrar for adequate reason." 1939 Md. Laws 620; see also John S. Strahorn, Jr., *Adoption in Maryland*, 7 MD. L. REV. 275, 304 (1943). This was six years before Maryland sealed court records in 1945. See 1945 Md. Laws 343. California, Colorado, and Virginia also kept court records open after sealing birth records. See *infra* notes 66-68 and accompanying text.

9. See *infra* notes 46-48 and accompanying text.

10. See *infra* note 63 and accompanying text.

11. See *infra* notes 70-102 and accompanying text.

were closing birth records, a growing national advocacy movement for greater openness in adoption was encouraging many states to establish passive and active registries through which adult adoptees and birth parents could attempt to seek information about and establish contact with one another.<sup>12</sup>

This Article relates how, in the 1940s and 1950s, a variety of expert voices advised states to seal court and birth records but to recognize in adult adoptees an unrestricted right of access to the birth records.<sup>13</sup> The reason given for the closing of court and birth records to the parties as well as the public was to protect adoptive families from possible interference by birth parents. In contrast, no reason was generally offered in specific support of the closings of birth records to adult adoptees that did occur from the 1930s through the 1960s.<sup>14</sup> It appears that the early closings of birth records to adult adoptees were not the result of articulated reasons, nor merely the result of confusion or happenstance. The early closings may have been, in no small part, the consequence of a contemporary social attitude or understanding, that is, of the social context in which they occurred. Adoption was beginning to be perceived as a means of creating a perfect and complete substitute for a family created by natural childbirth.<sup>15</sup> Over time, as legal rules established a nearly universal regime of secrecy with respect to all persons' access to court records and all persons' except adult adoptees' access to birth records, the regime of secrecy itself inevitably influenced social attitudes and un-

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12. With passive registers, adoptees and birth relatives may register their interest in or willingness to exchange information or make contact. When a match occurs, the parties are put in touch with one another. With active registries, also known as "search and consent" systems, when one party registers, an intermediary undertakes a search and, if possible, makes contact with a third party or third parties on behalf of the registrant. More than twenty states have passive registry systems and more than twenty-five have active ones, many of which also allow registrants to register in advance their willingness to have contact. See 2 HOLLINGER ET AL., *supra* note 4, at app. 13-A; Madelyn Freundlich, *Open Records and Voluntary Registries*, available at <http://www.adoptioninstitute.org/policy/polrec.html> (last visited Feb. 1, 2001); *Provisions for Record Access*, available at <http://www.american-adoption-cong.org/aacprov.html> (last visited Feb. 1, 2001) (defining terms used by different state adoption systems); *State Adoption Disclosure Laws at a Glance*, available at <http://bastards.org/activism/access.htm> (last modified Aug. 7, 2000). Efforts to establish a federal passive registry have been unsuccessful, see, e.g., Bill to Establish a National Voluntary Mutual Reunion Registry, S. 1487, 105th Cong. (1997) (passed by the Senate and referred to the House Committee on Ways and Means), and have proven controversial among open records advocates, with some supporting and others opposing measures short of completely open records, see, e.g., *Survey Says: Membership of Two Minds on Federal Reunion Registry*, GOOD CAUSE (Am. Adoption Cong., D.C.), Fall 1998, at 1, 1, 8 (stating that there was no consensus among members of group).

13. See *infra* Part III.

14. See *infra* Part III.

15. See *infra* Part IV.A.

derstandings. Actions once thought natural, such as attempts by adoptees to learn information about their birth families, came to be socially disfavored and considered abnormal. Such attempts acquired negative social meanings: they were the psychologically unhealthful product of unsuccessful adoptions that had failed to create perfect substitutes for natural families created by childbirth, and they indicated adoptees' rejection of and ingratitude toward adoptive parents.<sup>16</sup> Eventually, lifelong secrecy would be viewed as an essential feature of adoptions in which birth and adoptive parents did not know one another.

Radical social change beginning in the 1960s as well as the movement for greater openness in adoptions spearheaded by adoptees, and to a lesser extent by birth parents, would come to threaten societal acceptance of a closed and secretive adoption system.<sup>17</sup> Not surprisingly, efforts to preserve and reinforce lifelong secrecy emerged at the same time that the adoptees' rights movement was leading states to move toward a somewhat greater degree of openness via the use of registries.<sup>18</sup> It was during this time that adult adoptees' access to birth records was finally foreclosed in almost all states and that a new understanding about such access became widespread.<sup>19</sup> The understanding focused on a perceived right to or guarantee of lifelong anonymity for birth parents, particularly birth mothers, who had surrendered children for adoption.<sup>20</sup> Adoptees' interest in birth families came to be seen as imperiling their birth parents' interests.

Today, this new understanding in turn is being challenged as we are deluged with newspaper and magazine articles, television shows, movies, and books that spotlight or refer to adoptee and birth parent searches and reunions.<sup>21</sup> Nevertheless, perhaps due in considerable part to the persistence of established social attitudes and understandings,<sup>22</sup> only six states currently recognize the once universal right of adult adoptees to unrestricted information about their ori-

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16. See *infra* notes 257-71 and accompanying text.

17. See *infra* Part IV.B.

18. See *supra* note 12 and *infra* notes 70-102 and accompanying text.

19. See *infra* Part IV.B.

20. See *infra* notes 356-88, 411-12 and accompanying text.

21. See *infra* notes 336-39 and accompanying text. In addition, a proliferation of websites and Internet resources facilitate, provide information about, and provide links to information about adoptee and birth parent searches and reunions. See, e.g., The ALMA Society, at <http://www.almanet.com>; American Adoption Congress, at <http://www.americanadoptioncongress.org>; Bastard Nation, at <http://www.bastard.org>; I.S.R.R. (International Soundex Reunion Registry), at <http://www.isrr.com>; National Adoption Information Clearinghouse, at <http://www.calib.com/naic>.

22. See *infra* Part IV.B.

gins.<sup>23</sup> Two states have recognized a qualified right to access.<sup>24</sup> Seven other states have recognized rights of access prospectively for future adoptees, also qualified by birth parents' rights to prohibit access, and a handful of states continue to permit access to, or have "re-opened," records that were not sealed at the time they were created.<sup>25</sup>

In Part II, this Article details the more accurate chronology of the laws regulating adult adoptees' access to birth records. In Part III, it presents a history of social and legal policies concerning such access. In Part IV, the Article describes and analyzes both the evolution of social attitudes about access to birth records and the relation-

23. Those states are: Alabama, ALA. CODE § 26-10A-31(g) (2000); 2000 Ala. Acts 794, Alaska, ALASKA STAT. § 18.50.510 (LEXIS 2000), Kansas, KAN. STAT. ANN. § 65-2423 (Supp. 1999), Oregon, OR. REV. STAT. § 432.420 (1999); 1999 Ore. Laws 604 (upheld in *Does v. Oregon*, 993 P.2d 822 (Or. Ct. App. 1999)), South Dakota, S.D. CODIFIED LAWS § 25-6-15.2 (LEXIS 1999), and Tennessee, TENN. CODE ANN. § 36-1-127 (1991).

24. In Delaware, birth parents wishing to block release of identifying information may file a written veto that must be renewed every three years. If no veto is on file when an adult adoptee requests the birth certificate, the state makes reasonable efforts to notify birth parents. If no veto is subsequently filed, the state releases the certificate sixty-five days after the request was made. The statute took effect in January 1999, and more than 100 birth certificates were issued during the first year. Two percent of affected birth parents have filed disclosure vetoes. Frederick F. Greenman, *TENOR: What We've Accomplished and What Lies Ahead*, 16 DECREE (Am. Adoption Cong.), No. 4, at 1, 3 (1999). In Nebraska, adopted persons twenty-one years of age and older have access to original birth certificates unless birth parents have signed notices of nonconsent. NEB. REV. STAT. § 43-146.04, .06 (Supp. 1997).

25. They are Colorado, COLO. REV. STAT. § 19-5-305 (Supp. 2000) (providing disclosure vetoes by birth parents), Hawaii, HAW. REV. STAT. ANN. § 578-15 (Michie 1997) (providing affidavit by birth parents requesting confidentiality), Maryland, MD. CODE ANN., FAM. LAW § 5-3A-02 (1999) (providing nondisclosure vetoes by parents), Montana, MONT. CODE ANN. § 42-6-109 (1999) (providing disclosure vetoes by birth parents), Oklahoma, OKLA. STAT. ANN. tit. 10, § 7505-6.6(D) (West Supp. 2001) (providing nondisclosure affidavits by biological parents), Washington, WASH. REV. CODE ANN. § 26.33.345 (West 1997) (providing nondisclosure affidavits by birth parents), Vermont, VT. STAT. ANN. tit. 15A, § 6-105(b)(2) (Supp. 1999) (permitting birth parents to file requests for nondisclosure). In Virginia, with respect to post-July 1, 1994, executed consents in parental placement adoptions (independent, non-agency adoptions), the entire court record is open to adoptive parents, adoptees at age eighteen, and the birth parents who executed the consents. VA. CODE ANN. § 63.1-219.54(E) (Michie 1995).

Colorado, Ohio, Maryland, and Montana continue to permit access to, or have "re-opened," some older records that were not sealed at the time they were created, see *infra* note 67 (records in Colorado adoptions concluded before 1967); Maryland (pre-June 1, 1947), Md. Code Ann., Rule 9-112 (2001) (stating that court records not already sealed before June 1, 1947, may be sealed only by request of a party; however, MD. CODE ANN., STATE GOV'T § 10-616(b) (Supp. 2000) states, "A custodian shall deny inspection of public records that relate to the adoption of an individual."); Montana (pre-1967), MONT. CODE ANN. § 46-6-109 (subject to birth parents' disclosure vetoes); Ohio (pre-1964), OHIO REV. CODE ANN. § 3705.12(A)(2)(c) (Anderson 1999) (making adoption records available to the adopted person and adoptive parent).

ship between those attitudes and the law.

## II. CHRONOLOGY OF ADULT ADOPTEE'S ACCESS TO BIRTH RECORDS

The leading legal treatise on adoption law conveys the impression that while the earliest twentieth century laws shielded adoption proceedings only "from public scrutiny" rather than from the participants themselves, laws concerning court and birth records that were passed from the 1920s through the 1950s provided "for the denial to everyone of access to these records, except upon a judicial finding of 'good cause.'"<sup>26</sup> The treatise outlines New York's "fairly typical" experience in which all records were sealed by the late 1930s<sup>27</sup> and reports that "[a] number of other states enacted legislation similar to New York's sealed records statutes at about the same time. Others passed similar statutes during the late 1940s or 1950s."<sup>28</sup> The treatise notes that some state laws allowed original birth certificates to be inspected "by anyone, including adult adoptees."<sup>29</sup> It also reports that in many states, "adoptees continued to have a legal right to inherit from members of their biological family . . . with the result that confidentiality at times yielded to the requirements of probate."<sup>30</sup>

Other writers convey the general impression that "by the middle of this century, . . . [a]lthough lawmakers initially enacted these secrecy provisions to protect the adoption triad from public exposure, this protection evolved to create and maintain secrecy within the triad: the birth family came to be entirely cut off from the adoptee and the adoptive family."<sup>31</sup> In a recent historical study of adoption agencies' treatment of records, *Family Matters: Secrecy and Disclosure in the History of Adoption*, historian E. Wayne Carp discerned in the first half of the century "a consensus both in policy and practice of openness in disclosing information to those most intimately connected to adoption."<sup>32</sup> By the middle of the century, however, "[b]y

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26. 2 HOLLINGER ET AL., *supra* note 4, § 13.01[1].

27. *Id.* New York's early sealing of both court and original birth records was actually highly atypical. *See supra* note 8.

28. 2 HOLLINGER ET AL., *supra* note 4, § 13.01[1].

29. *Id.* The treatise identifies four of these states and refers to "other southern states" in a footnote. It would be more accurate to say that many states permitted adult adoptees to inspect the original birth certificates, and that some of them also permitted adoptive parents or minor adoptees to do so. *See infra* notes 54-69 and accompanying text.

30. 2 HOLLINGER ET AL., *supra* note 4, § 13.01[1]; *see infra* notes 169-79 and accompanying text.

31. Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1005 (1995) (footnotes omitted) (emphasis omitted); *see also, e.g.*, Burton Z. Sokoloff, *Antecedents of American Adoption*, FUTURE OF CHILDREN, Spring 1993, at 17, 21.

32. CARP, *supra* note 5, at 100.



law, court proceedings of adoption *and birth certificates* had been made confidential,<sup>33</sup> that is, they had been permanently closed to the parties as well as the public. A recent sociological study of the current debate over sealed adoption records explains simply, "[b]y the late 1940s, laws obliterating the adopted person's natal identity had become the rule rather than the exception."<sup>34</sup>

In the mid-1920s, there were virtually no confidentiality or secrecy provisions in adoption law. In a 1925 report, the U.S. Children's Bureau described and appeared to endorse what little confidentiality existed for participants in the process with respect to public access to court records. The Bureau, which was established in 1912 within the Department of Commerce and Labor, conducted research, published reports and pamphlets, and was through the 1940s "instrumental," according to historian Carp, "in reforming adoption laws, instructing professional adoption workers, and educating the American public on adoption issues."<sup>35</sup> In its 1925 report, the Bureau spoke approvingly of two states in which court records were open only to the parties or by court order and of two additional states in which records could be closed from inspection at the discretion of the judge.<sup>36</sup> With respect to contact between birth and adoptive parents, the report noted that while many states ordinarily required the presence in court of the birth parent or the guardian of the child to be adopted, "the obligatory presence of a parent who has already recorded his consent may not be of advantage to the child or conducive to the success of the new arrangement."<sup>37</sup>

By the mid-1930s to the early 1940s, there were more state provisions for confidentiality with respect to the general public's access to court records, but still few provisions for secrecy among the participants. By the late 1930s, fewer than a third of the states<sup>38</sup> accorded court records any degree of confidentiality; of those that did,

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33. *Id.* (emphasis added). "[T]he intent of the law had been to exclude the public and protect the privacy and self-esteem of adoptive parents and adoptees." *Id.*

34. KATARINA WEGAR, *ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS* 25 (1997). Professors Naomi Cahn and Jana Singer provided a richer and more subtle summary of the history of secrecy in adoption law, which drew on Professor Carp's work and located in the 1960s "the transmu[tation of] traditional confidentiality requirements into a regime of sealed records and secrecy which prevented all members of the adoption triad from accessing information." Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 157 (1999).

35. CARP, *supra* note 5, at 22-23.

36. See EMILY FOSTER PECK, U.S. DEP'T OF LABOR, *ADOPTION LAWS IN THE UNITED STATES* 19 (1925).

37. *Id.*

38. The term "states" in this Article and in the study discussed here includes the states of the United States at the time in question and the District of Columbia.

most permitted access to such records only to "parties in interest." These parties would always include adoptive parents if not adoptees as well.<sup>39</sup> A 1935 summary of legislation on adoption reported a high volume of legislation in the preceding decade, thirty-nine states having either "enacted new legislation or amended repeatedly their laws upon the subject of adoption."<sup>40</sup> As of 1935, six states provided access to court records only to the parties or by court order; four states kept the records of decree open to the public, but permitted the court to withhold other court documents from inspection; and a single state permitted access only by court order.<sup>41</sup> A survey of state adoption statutes in 1938 reported ten states in which court records were closed, except by court order, to all but the parties in interest; one state in which reports of investigations filed with the court were subject to inspection only by court order; and one state where all records except the decree could be withheld from inspection at the discretion of the judge. It was in just three states that court records could be opened only by court order.<sup>42</sup> By 1943, however, it was reported that more than half the states had provisions protecting court records from *public* inspection, with access usually limited to "parties in interest" or "parties to the action,"<sup>43</sup> the latter, at least, generally including only the adoptive parents or the adoptive parents and the adopted child.<sup>44</sup>

Court records, of course, may contain a variety of types of information about the parties in investigative reports as well as in pleadings and briefs and in testimony and other evidence, while birth certificates, although they vary from state to state and over time, in the 1930s through the 1950s usually contained only information such as facts about the birth; the mother's name, maiden name, age, birthplace, address, and earlier pregnancies; the father's name, age, birthplace, and occupation; whether the child was born to married

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39. "Parties of record" or "parties to the action" would include the adopting parents who file the adoption petition and would not include the birth parents, whose consents or relinquishments are required in the action if their parental rights have not been terminated. A state may or may not consider the child, who is the subject of the petition, to be a party of record. *See infra* note 68. The concern that courts might consider birth parents as "parties in interest" at one time prompted federal officials to recommend limiting access to "parties of record," in order to ensure that birth parents would not have access. *See infra* note 105 and accompanying text.

40. Carl A. Heisterman, *A Summary of Legislation on Adoption*, 9 SOC. SERV. REV. 269, 269 (1935).

41. *See id.* at 289.

42. *See* LEE M. BROOKS & EVELYN C. BROOKS, *ADVENTURING IN ADOPTION* 140-61 (1939). In one of the ten states in which court records were closed to all but the parties in interest, the names of the adopters did not appear in the records. *See id.* at 161.

43. Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 723 n.39 (1950) [hereinafter *Moppets on the Market*].

44. *See supra* note 39.

parents; and the name of the person or persons who attended and certified the birth.<sup>45</sup> Before 1930, birth records were not amended when a child was adopted.<sup>46</sup> During the 1930s states began to provide for new birth certificates with the adoptive parents' names substituted for the birth parents' names. In 1935, Carl Heisterman's summary of legislation reported that a number of states required their courts to notify state vital statistics officials of adoption decrees and that five of those states provided for the issuance of a new birth certificate for adopted persons. No arrangements for sealing original birth records were reported.<sup>47</sup> The 1938 survey reported that six states simply required reports of adoptions to be made to vital statistics officials while another nine states provided for new birth certificates to be issued for adoptees. Among those nine states, one state provided that copies of the original certificate were to be available only to the child when of age or to the adoptive parents,<sup>48</sup> and one state allowed access only to "parties in interest."<sup>49</sup> A 1939 book by a

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45. These items of information are included among those recommended by the federal government to the states in all or in three of the four "standard certificates" forms that were promulgated in 1930, 1939, 1949, and 1956. The standard certificates also included an address for the certifier, who might or might not be the medical attendant at the birth. Race of the parents was also to be recorded. See U.S. DEPT OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS: THE 1989 REVISION OF THE U.S. STANDARD CERTIFICATES AND REPORTS 18-19 (1991). With respect to what information was to be provided on certified copies issued by a state, a government analyst explained in a 1947 article that because "the birth certificate has become an integral part of our everyday life," some states do and all states should provide copies with "only the facts a person needs for a particular purpose and nothing more," excluding facts "never intended for public view. These include information about complications of pregnancy and delivery, the results of the mother's test for syphilis, crippling conditions of the infant, and illegitimacy." Helen C. Huffman, *The Importance of Birth Records*, 1947 NATIONAL CONFERENCE OF SOCIAL WORK 351 [hereinafter Huffman, *Importance*]; see also Helen C. Huffman, *A First Protection for the Child Born Out of Wedlock*, 11 CHILD. 34, 34 (1947) [hereinafter Huffman, *First*]. The author was a social science analyst in the National Division of Vital Statistics, U.S. Department of Public Health Service. Huffman, *First*, *supra*, at 34.

46. See MARY RUTH COLBY, DEPT OF LABOR, PROBLEMS AND PROCEDURES IN ADOPTION 120 (1941).

47. See Heisterman, *supra* note 40, at 288-89.

48. See COLBY, *supra* note 46, at 143. A 1961 amendment made clear that a certified copy of the original record could be issued, or inspection could be permitted, "upon the specific written request of the adopted person, if over eighteen years of age, or of an adopting parent of such person." CONN. GEN. STAT. ANN. § 7-53 (West 1972) (prior to 1975 amendment). In earlier versions of the statute, the language was unclear, suggesting possibly that it was the new birth certificate, rather than the old one, that was available to the adult adoptee and the adopting parents. See *id.*

49. COLBY, *supra* note 46, at 147. The survey overlooked the New York law that provided for the issuance of new birth certificates and the sealing of original birth records, with the original birth records to be opened only by court order. See 1936 N.Y. Laws 854; COLBY, *supra* note 46, at 120-21. The survey also did not report that Massa-

social worker and a sociologist stated, without citation, that fifteen states provided for amending birth certificates.<sup>50</sup> In a 1941 publication, the U.S. Children's Bureau agreed that "[t]he reporting of adoptions to the division responsible for recording vital statistics for the purpose of changing the birth record is a relatively new procedure."<sup>51</sup> It claimed, however, without citations to statutes or to secondary sources, that about two-thirds of the states had enacted laws making it possible to amend adopted children's birth records.<sup>52</sup> Of the seven states the Bureau did identify, only three were said to seal original birth records from public inspection, opening those records only upon the demand of the child, upon the demand of his natural or adopting parents, or by court order.<sup>53</sup>

With respect to court records rather than birth records, contemporary evidence indicates that by the late 1940s and early 1950s a significant, if not a dramatic, shift had occurred: court records by that time were apparently closed in many states to all persons. For original birth certificates, however, as more states began to provide adoptees with new birth certificates, the provisions that were developing were apparently quite different, usually limiting access to the public but *not* to the adult adoptee. In a 1948 volume "digesting the adoption law and procedure of all states,"<sup>54</sup> the author reported that most states make court records secret and available only by court order and that "[i]n most states, too, it is possible to obtain the issuance of a new birth certificate in the new name of the adopted child. Generally, the old certificate will be sealed and filed, and will be opened only upon request of the adopted person, if of legal age, or by an order of the court."<sup>55</sup> A federal vital statistics official, in a 1947 article, noted that "[n]early all states now prepare a new birth record for the adopted or legitimated child, and only the details of this procedure still need to be improved." The article stressed the adoptee's "right to a document linking his original and adoptive identities."<sup>56</sup> It did not mention that any state had foreclosed adult adoptee access to original records, although a few states had done so.<sup>57</sup> In 1953, at proceed-

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chusetts and Pennsylvania provided new birth certificates, contrary to information in the 1935 survey's tally, *see* Heisterman, *supra* note 40, at 288-89, but until 1938, Massachusetts law applied only to persons of illegitimate birth who acquired a new name by judicial decree. COLBY, *supra* note 46, at 121.

50. *See* EDITH M.H. BAYLOR & ELIO D. MONACHESI, *THE REHABILITATION OF CHILDREN: THE THEORY AND PRACTICE OF CHILD PLACEMENT* 31 (1939).

51. COLBY, *supra* note 46, at 120.

52. *Id.*

53. *Id.* at 121.

54. MORTON L. LEAVY, *Preface* to *LAW OF ADOPTION SIMPLIFIED* (1948).

55. *Id.* at 18-19.

56. Huffman, *Importance*, *supra* note 45, at 356-57.

57. *See id.* For example, Hawaii (1945), *see* Bobbi W.Y. Lum, *Privacy v. Secrecy*:

ings in which a draft of the Uniform Adoption Act was presented to the National Conference of Commissioners on Uniform State Laws, the committee chair expressed the view that the act's provision for making adoption court records available only by court order was commonplace and non-controversial and also that many states, as recommended by the act, both provided for the issuance of new birth certificates and permitted access by adult adoptees to original birth records.<sup>58</sup> Approving these uniform law recommendations, a 1955 *Iowa Law Review* article described as "the prevailing modern view" the provisions that court records were to be opened only by court order while original birth records could be inspected by adult adoptees.<sup>59</sup>

A significant shift in birth records policy had in fact occurred by 1960, the year every state reported its statutes and procedures in *Digest of Statutory Provisions and Administrative Procedures for Adoption as Related to Birth Certificates*.<sup>60</sup> Of the forty-nine reporting states and the District of Columbia, twenty-eight reported that original birth records were available only by court order.<sup>61</sup> Wisconsin provided for inspection "at the discretion of the State registrar or upon order of a court of competent jurisdiction," and New Hampshire "at the discretion of the State registrar or the town clerk who has custody of the original birth record" or by court order.<sup>62</sup> But twenty states, forty percent of all the jurisdictions, indicated that as of 1960, original birth certificates could be inspected by adult adoptees and otherwise by court order.<sup>63</sup> Four of the twenty states did not specify

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*The Open Adoption Records Movement and Its Impact on Hawaii*, 15 U. HAW. L. REV. 483, 489-90 (1993), Maryland (1939), and New York (1936), see *supra* note 8, had foreclosed adult adoptee access to original records.

58. See *infra* notes 118-23 and accompanying text.

59. Maurice H. Merrill & Orpha A. Merrill, *Toward Uniformity in Adoption Law*, 40 IOWA L. REV. 299, 328 (1955) (approving the provisions of the Uniform Adoption Act and the Uniform Vital Statistics Act, discussed *infra* at notes 118-25).

60. NAT'L OFFICE OF VITAL STATISTICS, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *DIGEST OF STATUTORY PROVISIONS AND ADMINISTRATIVE PROCEDURES FOR ADOPTION AS RELATED TO THE BIRTH CERTIFICATE* (1960) [hereinafter *ADOPTION DIGEST*].

61. See *id.* Michigan's original birth records were effectively inaccessible because, while they were available to anyone who knew the adoptee's name at birth, they were not cross-referenced with the adoptee's new name. See *id.*

62. *Id.*

63. Those states were Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and Wyoming. See *id.* It is possible, of course, that practice may not always have been consistent with these laws, and there is evidence of some confusion about the law in a small number of states. See *infra* notes 98-102, 272-84 and accompanying text. Whether a state recognizes adult adoptee access to court and birth records is a different matter from the practices of state social service agencies with respect to divulging information in their files. For

that the adopted person had to be an adult in order to inspect the records.<sup>64</sup> Seven of the twenty states also permitted adoptive parents to inspect the records.<sup>65</sup> Virginia, until 1977, permitted adult adoptee access to court records but not to birth records.<sup>66</sup> In Colorado, court records were available to the parties; however, these records were closed to them in 1967.<sup>67</sup> In California, complete court records were available to adoptive parents under a law that is still in effect but that at present may be inconsistently applied.<sup>68</sup> Similarly, of course,

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example, in Alabama at a time when the law provided for adult adoptee access to the birth records, the State Department of Pensions and Security, according to a report of a New York social worker, gave adult adoptees access "to all information about themselves except the names of their biological parents, which [could] be given only with such parents' consent." Joel Freedman, *An Adoptee in Search of Identity*, 22 SOC. WORK 227, 227 (1977). Upon request, the department would confer with the parents and arrange a reunion. See *id.*

64. They were Alabama, Louisiana, Massachusetts, and Ohio. See ADOPTION DIGEST, *supra* note 60.

65. They were Alabama, Connecticut, Louisiana, Ohio, Oklahoma, Pennsylvania, and South Dakota. See *id.*

66. Virginia law provided that the files of adoption cases, "none of which shall be exposed to public view but which shall be made available . . . to persons and attorneys having an interest in the subject matter . . . and to such other persons as the court shall direct in specific cases." VA. CODE ANN. § 63-359.1 (Michie 1949 & Supp. 1966). The law also required that "[u]pon the entry of a final order of adoption, or other final disposition of the matter, the clerk . . . shall forthwith transmit to the Commissioner all reports made in connection with the case." The file with the reports "shall not be open to inspection, or be copied, by anyone other than the adopted child, if twenty-one years of age and the adoptive parents, except upon the order of a circuit court entered upon good cause shown." VA. CODE ANN. § 63-360 (Michie 1949 & Supp. 1966). A 1975 law review note reported that the records the adoptee could inspect "usually do not identify the biological parents, although they do contain the adoptee's original name," citing a letter from an official of the Virginia Department of Welfare. Patricia Gallagher Lupack, Note, *Sealed Records in Adoption: The Need for Legislative Reform*, 21 CATH. LAW. 211, 214 n.22 (1975). The law was amended in 1977 to require a court order upon good cause shown for an adult adoptee to access "information with respect to the identity of the biological family." 1977 Va. Acts ch. 556.

67. Colorado closed court records to public inspection in 1949. 1949 Colo. Sess. Laws 211. In 1967, the legislature provided that records would be "open to inspection only upon order of the court for good cause shown." 1967 Colo. Sess. Laws 1018. In 2000, the legislature partially re-opened pre-1967 records to the parties and provided that original birth certificates, orders of relinquishment, and orders of termination of parental rights in adoptions finalized after September 1, 1999, be open to inspection by adult adoptees and adoptive parents of a minor adoptee, unless birth parents within three years of the birth have provided the court with—and have not since withdrawn—a statement that the parents wished the identifying information to be kept confidential. COLO. REV. STAT. ANN. §§ 19-1-103(6.5), 19-5-305 (West Supp. 2000).

68. CAL. FAM. CODE § 9200(a) (West 1994). The law specifies that the "petition relinquishment or consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition" is open only to "the parties to the proceeding and their attorneys and the department." Others must obtain a court order based on findings of "exceptional circumstances" and "good cause approaching the ne-

in all states in independent adoptions, at least the adoptive parents' attorneys knew and had records that indicated the identity of birth parents.<sup>69</sup>

Of the twenty states in 1960 with laws that permitted adoptees access on demand to original birth records, two—Alaska and Kansas—have never closed these records.<sup>70</sup> In South Dakota, both these records and court records appear to have always been available on demand, although it became necessary to make the demand to a court and obtain a court order.<sup>71</sup> Of the remaining states, four

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cessitous." *Id.* The parties to the proceeding are the adoptive parents. Telephone Interview with Karen R. Lane, California Adoption Law Practitioner and Member of the American Academy of Adoption Attorneys (Dec. 19, 2000) (on file with author). A 1961 California intermediate appellate court decision noted that the "files are never closed to the parties to the proceedings or their attorneys." *Hubbard v. Superior Court*, 189 Cal. App. 2d 741, 752 (Dist. Ct. App. 1961). In that case, the attorney for the minor adoptees had inspected the files and a third party had sought to inspect them. *See id.* at 743. The national advocacy group Bastard Nation recently reported that "[i]ndividual counties are given considerable freedom to interpret state adoption laws, with the effect that a number of counties release virtually all court controlled adoption records on demand of the adoptive parent and/or of the adult adoptee, with written permission of the adoptive parents." *State Adoption Disclosure Laws at a Glance*, *supra* note 12.

69. *See generally State Adoption Law at a Glance*, *supra* note 12. In an independent or private, non-agency adoption, the adoptive parents' attorney files the papers signed by the birth parent or parents giving consent or relinquishing parental rights.

70. *See* ALASKA STAT. § 18.50.500 (LEXIS 2000); *Op. Alaska Att'y Gen.*, No. 883-86-0110, 1986 WL 81152, at \*1 (June 5, 1986) (citing the long history of availability of original birth certificates to adult adoptees); KAN. STAT. ANN. § 65-2423(a) (1992) (permitting release of original birth records to adoptees). In Kansas, court records are also open to "parties in interest," a term that does not include "genetic parents once a decree of adoption is entered." KAN. STAT. ANN. § 59-2122(a) (1994).

71. The practice in South Dakota at the present time is for adopted adults to petition a court, making a demand for access to both court and original birth records, which is then granted by the court, according to the Adoption Program Specialist, Division of Child Protective Services, South Dakota Department of Social Services. *See* Telephone Interview with DiAnn Kleinsasser (Oct. 18, 1999) (on file with author). Ms. Kleinsasser ordinarily helps approximately ten adoptees a month fill out standard petition forms, except for periods in which television programs have appeared on the subject, during which she has handled a greater volume of inquiries. *See id.* South Dakota statutes provide that *court records* are "not open to inspection or copy by persons other than the parents by adoption and their attorneys, representatives of the department of social services, and the child when he reaches maturity, except upon order of the court." S.D. CODIFIED LAWS § 25-6-15 (LEXIS 1999). A 1969 attorney general opinion explained that under this provision, "the files and records of the court in an adoption proceeding[] are open to inspection or copy by the adopted child when he reaches his maturity, without a court order." 69 *Op. S.D. Att'y Gen.* 195 (1969). Birth records, on the other hand, "may be opened only upon order of a court of competent jurisdiction, or by the secretary of health for purposes of properly administering the vital registration system." S.D. CODIFIED LAWS § 34-25-16.4 (Michie 1994). Non-identifying information is available to adoptive parents or adult adoptees without court order, S.D. CODIFIED LAWS § 25-6-15.2 (LEXIS 1999), and a public registry is available to birth parents and

changed these laws in the 1960s,<sup>72</sup> six did not do so until the 1970s,<sup>73</sup> and seven did so only after 1979.<sup>74</sup> It is possible, of course, and not inconsistent with the analysis offered below,<sup>75</sup> that the practices of states' superintendents of records were not always consistent with state law during the period from 1960 until the law changed. In any event, the fact that in 1960 forty percent of the states recognized a right of access to original birth records is entirely consistent with the historical context described below.<sup>76</sup>

In 1961, shortly after the Department of Health, Education, and Welfare compiled its digest, Illinois sealed original birth records to adult adoptees as well as to all others, making them "not . . . subject to inspection or certification except upon order of a court of competent jurisdiction."<sup>77</sup> Two years later, in 1963, Ohio also closed original birth records to adoptees, specifying that they could be opened only upon a showing of good cause.<sup>78</sup> The next year, Georgia ended adult adoptees' access to their original birth certificates, making the records "not . . . subject to inspection except upon order of the superior court."<sup>79</sup> In 1966, the New Hampshire Attorney General's Office interpreted New Hampshire law as giving the state registrar the "authority and the duty" to direct town clerks not to cross-reference original and new birth certificates, making it impossible to furnish original records to adoptees who do not already know their original surnames.<sup>80</sup> In 1967, Arizona repealed its statutory provision allowing adult adoptees to inspect their original birth records, instead allowing inspection only "upon order of a court of competent jurisdiction."<sup>81</sup>

Six more states changed their laws in the 1970s. In 1973, Nevada eliminated access by adult adoptees, allowing for opening origi-

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adoptees, under which either may consent to the release to the other of the identifying information, *see id.* § 25-6-15.3.

72. *See infra* notes 77-81 and accompanying text.

73. *See infra* notes 82-88 and accompanying text.

74. *See infra* notes 89-102 and accompanying text.

75. *See infra* Part IV.

76. *See infra* Part III.

77. 1961 Ill. Laws 2943.

78. 1963 Ohio Laws 3107.14; *New Birth Certificate Law for Adopted Children Explained by Dept. of Health*, 38 OHIO B. 110, 112 (1965); Wendy L. Weiss, Note, *Ohio House Bill 419: Increased Openness in Adoption Records Law*, 45 CLEV. ST. L. REV. 101, 133 n.33 (1997). An Ohio law passed in the 1980s "re-opened" original birth records of persons whose adoptions were decreed prior to 1964, making such records available on demand to adopting parents, adoptees, and lineal descendants of adoptees. *See* OHIO REV. CODE. ANN. § 3705.12 (Anderson 2000).

79. 1964 Ga. Laws 88-1714.

80. 1 Op. N.H. Att'y Gen. 186 (1966).

81. 1967 Ariz. Sess. Laws 77 (repealing ARIZ. REV. STAT. ANN. § 36-326).



nal birth records only upon an "order of the court issuing the adoption decree, expressly so permitting, pursuant to a petition setting forth the reasons therefor [sic]."<sup>82</sup> It was also in 1973 that Wyoming closed these records to adult adoptees, requiring for inspection an "order of a court of competent jurisdiction."<sup>83</sup> In 1974, Massachusetts eliminated the provision in its laws under which adoptees of any age had a right to their original birth records, thereafter permitting release of information from the records "only upon receipt of an order of the probate court."<sup>84</sup> In 1975, Connecticut moved to abolish access by adult adoptees, requiring a court determination that inspection by the petitioning adoptive parents, adult adoptee, or other person "will not be detrimental to the public interest or to the welfare of the adopted person or to the welfare of the natural or adopting parent or parents."<sup>85</sup> In 1975, North Dakota also eliminated adult access to original birth records, providing that "they shall not be subject to inspection except upon order of a court of competent jurisdiction."<sup>86</sup> In 1977, Louisiana ended adoptees' right to obtain upon demand a court order opening their birth records. The state thereafter required that there be "compelling reasons" and that the records be opened "only to the extent necessary to satisfy such compelling necessity."<sup>87</sup> (Also in 1977, Virginia amended its law so that adult adoptees would no longer have automatic access to investigative reports used in adoption proceedings.)<sup>88</sup>

The largest number of legislative actions in this final chapter of the story of closing birth records took place after 1979, when seven more states closed birth records to adult adoptees. In 1979, in Montana, illegitimately born adopted persons could no longer have their original birth records opened on demand, being required by an act passed that year to apply to a court for disclosure.<sup>89</sup> In 1981, the law

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82. NEV. REV. STAT. 440.310 (Michie 1973).

83. 1973 Wyo. Sess. Laws 177.

84. 1974 Mass. Acts 546 (codified as amended at MASS. GEN. LAWS ANN. ch. 46, § 13 (Law Co-op 1993)).

85. *Sherry H. v. Probate Court*, 411 A.2d 931, 934 (Conn. 1979) (citing 1975 Conn. Pub. Acts 75-170). Court records were also available to adoptees over twenty-one and adopting parents until 1974, when access was limited to the adoptive parents or to the adoptee older than eighteen "for cause shown, either ex parte or with such notice the court deems advisable." Other persons may have access "upon order of the court of probate rendering the decree or any other court of competent jurisdiction." 1974 Conn. Pub. Acts 74-164.

86. 1975 N.D. Laws 223.

87. *Kirsch v. Parker*, 383 So. 2d 384, 386 n.2 (La. 1980) (quoting LA. REV. STAT. ANN. § 40.81(A) (West 1997), as amended by 1977 La. Acts 659); *Chambers v. Parker*, 349 So. 2d 424, 425-26 (La. Ct. App. 1977).

88. See *supra* note 66.

89. 38 Op. Mont. Att'y Gen. 62 (1980).

was amended to require that all adopted persons obtain a court order.<sup>90</sup> In the meantime, in 1980, Florida had eliminated adult adoptee access to original birth records, allowing "inspection only upon order of the court."<sup>91</sup> In 1981, Utah changed its law permitting adult adoptees access to original birth records, specifying that they "shall not be open to inspection except upon the order of a court of competent jurisdiction."<sup>92</sup> Also in 1981, Wisconsin eliminated its provision for inspection at the discretion of the state registrar.<sup>93</sup> In 1983, Idaho amended a law under which original birth records could be "revealed" to legitimated or adopted persons "if of age, [as well as their] parents or the duly appointed legal representative of any of them, or upon court order issued in the interest of justice."<sup>94</sup> The amendment removed adopted persons and their parents and representatives from the provision so that thereafter access would be available only in connection with concluded paternity determinations.<sup>95</sup> In 1984, Pennsylvania effectively repealed its provision allowing adopted adults and adoptees' parents, guardians, or legal representatives access to original birth records.<sup>96</sup> In Alabama, before 1990, not only were original birth records open to adult adoptees and adoptive parents, but court records were also available as well to the parties in interest and their attorneys. Alabama, in 1990, closed original birth records and court records at the same time that it established a system for providing non-identifying information, and identifying information under certain circumstances, a system that included the appointment of an intermediary to contact the natural parents on the adoptee's be-

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90. 1981 Mont. Laws 228 (amending MONT. CODE ANN. § 50-15-304).

91. 1980 Fla. Laws ch. 80-296 (amending FLA. STAT. ANN. § 36.162).

92. 1981 Utah Laws 126 (enacting Utah Vital Statistics Act, UTAH CODE ANN. § 26-2-10 (2000)).

93. 1981 Wis. Laws 359.

94. 1983 Idaho Sess. Laws 7. Idaho had before that date, and continues to have, another provision under which original birth records may be inspected only upon court order. That provision is evidently meant to apply only to public requests for inspection, and to be read in conjunction with the more specific provision that formerly permitted adopted adults and legitimated adults access, and that still permits the latter to have access. IDAHO CODE § 39-257 (Michie 1993); ADOPTION DIGEST, *supra* note 60.

95. See IDAHO CODE § 39-257.

96. See 35 PA. CONS. STAT. ANN. § 450.603(c) (West 1993); 1984 Pa. Laws 979; 23 PA. CONS. STAT. ANN. § 2905 (West Supp. 2000); 78 Op. Pa. Att'y Gen. 43 (1978) (asserting that the Division of Vital Statistics must make certified copies of original birth certificates available to competent adult adoptees). The 1984 enactment repealed the provisions allowing access "insofar as they are inconsistent with" a law making court records available only upon court order "for good cause shown," or after a court-appointed or agency-appointed intermediary has obtained consent from the adoptees' birth parents, or after the death of the birth parent about whom information is sought. See *infra* note 278 and accompanying text.

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Oklahoma has been included here among the twenty states that in 1960 reported laws providing adult adoptee access to original birth records, although the meaning of Oklahoma's law is debatable. The two statutory provisions the state referred to in its report to the federal government in 1960 had been passed at the same time, in 1957. One provided that original *birth records* "may be opened by the State Registrar only upon the demand of the adopted person, if of legal age, or of the adoptive parents, by an order of the court."<sup>98</sup> The other, pertaining to *court records*, provided that "[n]o person shall have access to such records except upon order of the judge of the court in which the decree of adoption was entered, for good cause shown."<sup>99</sup> There is no Oklahoma case law concerning the birth records provision or suggesting the practice of the courts over the years,<sup>100</sup> although one legal

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97. See ALA. CODE § 26-10A-32 (citing 1990 Ala. Acts 90-554); *id.* § 26-10-4; *id.* § 26-10A-31 (citing 1990 Ala. Acts 90-554); *id.* § 26-10-5. The law stated that non-identifying information could be provided to adoptees when they reach the age of nineteen or to natural parents, and identifying information could be provided to adoptees when they reach the age of nineteen if the natural mother or father, who may be contacted by a court-appointed intermediary if necessary, has consented to the release of their identity, or if the court determines that the information should be released without consent. *Id.* In 2000, Alabama joined Tennessee and Oregon in re-opening birth records to adult adoptees. See *supra* note 23.

98. OKLA. STAT. ANN. tit. 10, § 60.18(2) (current version at title 10, section 7505.6.6 by 1997 Okla. Sess. Laws 366). The state paraphrased this section as, "the original birth record and any other document pertinent to the case may be inspected by the adopted person, if of legal age, or by the adoptive parents. In either case, a court order must first be obtained from a court of competent jurisdiction." Adoption Digest, *supra* note 60.

99. OKLA. STAT. ANN. tit. 10, § 60.17(B) (current version at title 10, section 7505.6.6 by 1997 Okla. Sess. Laws 366). Neither a vital statistics provision passed in 1963 nor an attorney general's opinion issued in 1982 settled the question of whether the court order required by the 1963 law to inspect birth records was to be available on demand. The 1963 vital statistics law states that the original birth certificate "shall not be subject to inspection except upon order of a court of competent jurisdiction or as otherwise specifically provided by law," OKLA. STAT. ANN. tit. 63, § 1-316 (West 1998), and the attorney general's opinion simply stated that "[a]dopted persons of legal age demanding to view their original birth certificate must, under the provisions of 10 O.S. 1971, § 60.18, obtain a court order." 14 Op. Okla. Att'y Gen. 204 (1982). The attorney general's opinion was based on the language of the statute, "by an order of the court," and the fact that this requirement was "in conformity with" the provisions of the *court records* law, which withheld court records from inspection "except upon order of the court for good cause shown." *Id.* (citations omitted). The author of the opinion, then an assistant attorney general and deputy chief of the civil division and now a senior assistant attorney general, said in an interview that the opinion indicated the two provisions were "not irreconcilable," but that the opinion did *not* address the question of whether the court had any discretion when adult adoptees make demands to the court for an order permitting them to inspect birth records. See Telephone Interview with Neal Leader (Dec. 10, 1999) (on file with author).

100. In a 1980 district court case concerning an adoptee's access to state welfare

commentator in 1973 reported that a public welfare official indicated that state law was being interpreted as a "sealed records statute."<sup>101</sup> The birth records provision was amended in 1997 to exclude access upon demand.<sup>102</sup> It seems likely that the legislature in 1957 intended to recognize a right of adoptive parents and adult adoptees to obtain a court order upon demand. This interpretation is supported by the plain language, that is, the use in the birth records provision of the words "upon demand"; by the difference between the language used in the birth and the court records provisions; and by the historical context described below.

### III. SOCIAL POLICIES AND ADOPTEES' ACCESS TO BIRTH RECORDS

When one searches the historical record from the 1930s through the 1960s to understand how and why the adoption process became cloaked in secrecy—specifically why court records in most states came to be closed to all, and birth records in many states came to be closed even to adult adoptees—one finds through the 1950s a chorus of influential, authoritative voices supporting the complete closure of *court records* while recommending that *original birth records* remain available to adult adoptees. More generally, throughout the entire period, one finds that the reasons proffered for confidentiality and secrecy focus solely on protecting adoptees from embarrassing disclosure of the circumstances of their births and on protecting adoptive parents and their adoptive children from being interfered with or harassed by birth parents, as it was believed they might be if birth parents and adoptive parents who were unknown to one another were to learn one another's identity. Among the legal, social service, and other social science commentators, there appears to be no or virtually no discussion of a need to protect birth parents from adult adoptees seeking and acquiring information about their birth families.

The U.S. Children's Bureau, one of the most influential actors in

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department records, the court construed Oklahoma's welfare records law as providing that the department's adoption records, like court records, were only subject to disclosure upon a showing of good cause. *See* *Schechter v. Boren*, 535 F. Supp. 1, 3 (W.D. Okla. 1980). Comparing Oklahoma and New York closed adoption records laws, the district court stated that Oklahoma law provides "for the sealing of records pertaining to an adoption unless 'good cause' is shown," but the court did not cite or consider the state's birth records provision. *See id.* The adoptee who sought the welfare department records had already obtained information, including the identity of her birth mother, in a "good cause" proceeding" under the state's court records provision. *Id.* at 4.

101. Barbara Prager & Stanley A. Rothstein, Note, *The Adoptee's Right to Know His Natural Heritage*, 19 N.Y. L.F. 137, 138 n.5 (1973) (citing a letter to Prager from the Director of Institutions, Social and Rehabilitation Services, Department of Public Welfare, State of Oklahoma).

102. 1997 Okla. Sess. Laws 366.

the development of adoption law in the mid-twentieth century,<sup>103</sup> stressed in the 1940s and 1950s the desirability of shielding both court records and original birth records from public inspection to protect the parties from public disclosure of personal information in the court records and, particularly, to protect adoptees from public disclosure of information that might indicate their birth parents were not married. The Bureau also advised that birth parents and adoptive parents should not have access to information about one another, in order to avoid the danger of the child and the adoptive parents being intruded upon by the birth parents. While urging that original birth records be sealed from public inspection, the Bureau specifically recommended that they should be available to adult adoptees. In 1941, the Children's Bureau published a study of adoption procedures in selected states in part to "furnish a basis for evaluating [existing] laws and for determining which aspects of the legislation now in operation could safely be recommended to other States."<sup>104</sup> The study spoke approvingly of a trend toward closing the court records of adoption proceedings to public inspection, noting that "parties in interest," who are generally permitted access to the records, might better be termed "parties of record" to ensure that birth parents whose rights have been terminated would not have access.<sup>105</sup> The suggestion was that "harm may be done" if "such a parent learn[s] the whereabouts of the child after adoption."<sup>106</sup> A Children's Bureau spokeswoman similarly warned in a 1945 social work journal: "The child should . . . be protected from . . . interference of his natural parents after he has been happily established in his adoptive home."<sup>107</sup> The report of a Bureau-sponsored conference in 1955 explained again the "desirable protection[]" that "the child not be disturbed by having two sets of parents," a situation that could be prevented by "placement of the child in such a way that the natural parents do not know where the child is placed."<sup>108</sup>

With respect to birth records, the Children's Bureau's 1941 study also approved of laws enacted after 1930 making it possible to amend the birth record of an adopted child "so that he may be spared the

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103. See *supra* note 35 and accompanying text.

104. COLBY, *supra* note 46, at 1.

105. See *id.* at 118-20.

106. *Id.*; see also Mary Ruth Colby, *Modern Safeguards in Adoption Legislation*, CHILD WELFARE LEAGUE AM. BULL., Dec. 1941, at 3, 5.

107. Maud Morlock, *Babies on the Market*, SURVEY MIDMONTHLY, Mar. 1945, at 67, 67 (emphasis omitted). She also wrote that adoptive parents "should be protected from . . . later disturbance of their relationship to [the child] by natural parents." *Id.* at 68.

108. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PROTECTING CHILDREN IN ADOPTION 13 (1955) [hereinafter PROTECTING CHILDREN].

embarrassment of explaining why his own name and the names of the parents are not the same as the names on his birth record."<sup>109</sup> The study described laws under which the original certificates were sealed and could be opened only upon the demand of the child himself, or upon the demand of his natural or adoptive parents, or by order of a court. The study reported the suggestion that a certificate of adoption might be preferable to a new certificate "since the child was not actually born to the adopting parents as the amended birth record implies." After this certificate of adoption was issued, the original birth record "would be sealed and opened only on request of the child or his representative or on order of a court."<sup>110</sup> Whatever form the substitute document should take, there was no suggestion in the study that creating the new certificate and sealing the old one was for the purpose of concealing the identity of the birth parents from the adult adoptee. The purpose was to spare the adoptee "the embarrassment of having a birth certificate which gives information of the circumstances of his birth when only proof of age and place of birth are necessary."<sup>111</sup> As a Bureau analyst concluded in 1946, "[f]or the protection of the adopted child[,] . . . [i]t is necessary . . . that the original certificate and the report from the court . . . be opened only upon court order, or upon request of the adopted person when of age."<sup>112</sup> This position was consonant with the earlier history of Progressive Era reformers who had sought to protect mothers and children from the stigma of the children's illegitimacy by making birth records confidential but who had never intended "to prevent children born out of wedlock, or adopted children, from viewing their own birth records."<sup>113</sup>

In a 1949 publication, the Children's Bureau failed to mention any concern with birth parents' privacy as a reason for sealing records and specifically endorsed adult adoptee access to original birth certificates. With regard to the reasons otherwise supporting sealing original birth records, the Bureau again cited only the importance of shielding the adoptee from the disclosure of embarrassing information. In one of two publications issued that year, the Bureau noted the importance of complete and accurate vital statistics records, facilitated by the forwarding of decrees of adoption to the state registrar of vital statistics. Without this information, it was explained:

[I]t is impossible for [the registrar] to give the adopted child the information that ties in the details on his original birth record with his new name and status under the adoption decree. Moreover, in

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109. COLBY, *supra* note 46, at 120.

110. *Id.* at 121.

111. *Id.* at 122.

112. Huffman, *First*, *supra* note 45, at 36.

113. CARP, *supra* note 5, at 49.

later life accurate and complete records will enable him to establish his true identity if occasion arises.<sup>114</sup>

In a joint publication with the American Association of Registration Executives' Council on Vital Records and Statistics, which recommended and endorsed birth records policies, the Bureau counseled that amendatory birth records should be prepared after decrees of adoption and legitimization, but it emphasized that "[i]t is very important that the child's original birth certificate be identified so that his complete birth record will be available to him when needed."<sup>115</sup> "The right to inspect or to secure a certified copy of the *original birth certificate* of an adopted child should be restricted to the [adoptee], if of legal age; or upon court order."<sup>116</sup> Again, the reasons given for sealing the original records from public inspection were that "[i]n many cases, the original certificate will show that the child was born out of wedlock or that its parents are unknown. It is desirable, also, that the natural parents and adopting parents should remain unknown to each other."<sup>117</sup>

These separate and quite different court records and birth records policies, recommended by the Bureau and by vital statistics professionals, were also disseminated in the 1940s and the early 1950s in two model statutes, the Uniform Vital Statistics Act of 1942<sup>118</sup> and the first Uniform Adoption Act, published in 1953.<sup>119</sup> With respect to court records, the Uniform Adoption Act provided that hearings would be held in closed courts and court records would be sealed:<sup>120</sup> "All papers and records pertaining to the adoption shall be kept as a permanent record of the court and withheld from inspection . . . except on order of the judge of the court in which the decree of adoption was entered for good cause shown."<sup>121</sup> At proceedings presenting the uniform act, these provisions were described by the chairman of the committee as ones concerning "the non-controversial subject of the confidential nature of the record and the proceedings."<sup>122</sup> With respect to birth records, the 1953 Uniform Adoption Act

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114. CHILDREN'S BUREAU, SOC. SEC. ADMIN., *ESSENTIALS OF ADOPTION LAW AND PROCEDURE* 23 (1949).

115. CHILDREN'S BUREAU & NAT'L OFFICE OF VITAL STATISTICS, *THE CONFIDENTIAL NATURE OF BIRTH RECORDS* 6 (1949).

116. *Id.* at 7.

117. *Id.*

118. UNIF. VITAL STAT. ACT (1942), *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1942) [hereinafter 1942 HANDBOOK].

119. UNIF. ADOPTION ACT (1953), *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1953).

120. *Id.* § 13(1).

121. *Id.* § 13(2).

122. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, *PROCEEDINGS IN COMMITTEE*

provided that the original birth certificate and a copy of the decree, which were to be sealed by the state registrar after a new certificate was prepared, "may be opened by the state registrar only upon the demand of the adopted person if of legal age or by an order of court."<sup>123</sup> The comment to this provision explained that the provision could be omitted in those states that have already adopted it as part of the Uniform Vital Statistics Act of 1942.<sup>124</sup> At proceedings presenting the Act, it was noted that "[a] good many states do have it. It is only in the rare occasion where that is not true that this Section adopts that part of the Uniform Vital Statistics Act."<sup>125</sup>

In 1959, the Model State Vital Statistics Act changed course without explanatory comment. The 1959 revision of and successor to the 1942 Act included an amended provision under which "the original certificate and the evidence of adoption, paternity, or legitimation shall not be subject to inspection except upon order of (a court of competent jurisdiction)."<sup>126</sup> Although the Children's Bureau incorporated this provision in a 1961 legislative guide, the Bureau continued to counsel that old and new birth records be cross-referenced so the registrar could "give the adopted child the information that ties in the details on his original birth record with his new name and status under the adoption decree. . . . [I]n later life accurate and complete records will enable him to establish his true identity if occasion arises."<sup>127</sup>

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OF THE WHOLE UNIFORM ADOPTION ACT 307 [hereinafter PROCEEDINGS].

123. UNIF. ADOPTION ACT § 14(2) (1953).

124. See *id.* § 14 cmt. (citing the UNIF. VITAL STAT. ACT, §§ 24, 35 (1942)).

125. PROCEEDINGS, *supra* note 122, at 309.

126. NAT'L OFFICE OF VITAL STATISTICS, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, MODEL STATE VITAL STATISTICS ACT: 1959 REVISION § 17(b)(1) (1960). The provision continues, as do a number of similar state provisions, "or as provided by regulation." *Id.* Such language about regulations in these statutes refers to provisions under which information may be released to other governmental agencies rather than to members of the public. The first model vital statistics act was produced in 1907 by the U.S. Bureau of the Census. See James A. Weed, *Vital Statistics in the United States: Preparing for the Next Century*, 61 POPULATION INDEX 527 (1995), available at [http://popindex.princeton.edu/current\\_items/Weed/Weed.html](http://popindex.princeton.edu/current_items/Weed/Weed.html) (last modified Nov. 19, 1998). The second model act was initially drafted by the Bureau of the Census in 1939 and then presented to the National Conference of Commissioners on Uniform State Laws. 1942 HANDBOOK, *supra* note 118, at 187. The Conference and the American Bar Association approved a revised version in 1942. *Id.* at 188. In 1946, responsibility for vital statistics was transferred from the U.S. Census Bureau to the U.S. Public Health Service's National Office of Vital Statistics. Weed, *supra*. The Office of Vital Statistics produced the 1959 revision. See MODEL STATE VITAL STATISTICS ACT: 1959 REVISION, *supra*. In 1960, responsibility was transferred within the Public Health Service to the National Center for Health Statistics, which produced revised model acts in 1977 and 1992. Weed, *supra*.

127. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE



When the Uniform Adoption Act was revised in 1969, it included a provision similar to the 1953 Act's provision requiring the clerk of the court to forward information to the appropriate vital statistics office,<sup>128</sup> but it omitted altogether the provision that required the sealing of the original birth certificate while allowing it to be inspected upon demand by an adult adoptee.<sup>129</sup> In other words, the 1969 Uniform Adoption Act omitted altogether the subject of access to original birth records by adult adoptees. There was a hint in a provision of the 1969 Act added in 1971 that disclosure of information perhaps should be within the discretion of the adoptive parents or the older adopted child. The provision was added in response to a 1969 New York case, a habeas corpus proceeding brought to obtain custody of a child, in which the trial judge ordered the attorney for the adoptive parents to disclose the identity of his clients.<sup>130</sup> The provision stated that "except as authorized in writing by the adoptive parent, the adopted child, if 14 or more years of age, or upon order of the court for good cause shown in exceptional cases, no person is required to disclose the name or identity of either an adoptive parent or an adopted child."<sup>131</sup> It was not until its 1994 revision that the Uniform Adoption Act included a provision for sealing original birth records from adult adoptees, specifically for sealing the records for ninety-nine years and making them available during that period only by court order<sup>132</sup> or upon request of adult adoptees who "furnished a consent to disclosure signed by each individual who was named as a parent on the . . . original birth certificate."<sup>133</sup>

Another influential national organization, the private Child Welfare League of America, never affirmatively recommended that original birth records be available to adult adoptees. The League, founded in 1921 with sixty-five organizations as charter members, quickly became "the most important private national agency for child welfare."<sup>134</sup> In 1958, it recommended both that court records "should be sealed and should not be open to inspection except on court order"<sup>135</sup> and that after a new birth certificate was issued, "[t]he original certificate should then be sealed."<sup>136</sup> Throughout the 1940s and 1950s,

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ADOPTION OF CHILDREN 29-30, 57 (1961).

128. Cf. UNIF. ADOPTION ACT § 14 (1953) with UNIF. ADOPTION ACT § 18 (1969).

129. See UNIF. ADOPTION ACT § 18 (1969).

130. See *Anonymous v. Anonymous*, 298 N.Y.S.2d 345, 347 (Sup. Ct. 1969).

131. REVISED UNIF. ADOPTION ACT § 16(3) (1969) (amended 1971).

132. See UNIF. ADOPTION ACT § 6-107, 9 U.L.A. 11 (1994).

133. *Id.* § 6-107(a).

134. CARP, *supra* note 5, at 45.

135. CHILD WELFARE LEAGUE OF AM., STANDARDS FOR ADOPTION SERVICE 60 (1959) [hereinafter 1958 STANDARDS].

136. *Id.* at 64.

however, the League gave as the reasons for confidentiality and secrecy only the need to keep adoptive and birth parents from knowing one another's identity and the need to protect adoptees and adoptive parents from the dangers of public access to personal information.

In the League's 1941 Standards for Children's Organizations Providing Foster Family Care, a section on adoption included among "[t]he safeguards that the adopting family should expect . . . [t]hat the identity of the adopting parents should be kept from the natural parents" and "[t]hat the adoption proceedings be completed without unnecessary publicity."<sup>137</sup> Safeguards for the state's and the child's protection included "[t]hat the birth records of an adopted child be so revised as to shield him from unnecessary embarrassment in case of illegitimacy."<sup>138</sup> The League, in a 1959 publication, similarly counseled agencies to protect adoptive parents by assuring them that "natural parents will not know with whom the child is placed."<sup>139</sup> With respect to the "relation of the court and adoption services," it advised that "[h]earings on adoption should be closed to the public. The identity of the natural and adoptive parents should be protected from each other."<sup>140</sup> The League did not advise agencies to give birth parents assurances of lifelong anonymity; rather agencies were to be sure that birth parents had "a full awareness of the implications . . . . It should be understood that all ties are to be permanently severed with the [adoption] of the child."<sup>141</sup>

In connection with the League's 1959 recommendation that original birth certificates "be sealed," the League's standards noted the desirability of "protect[ing] individuals from possible embarrassment in revealing that they were born out of wedlock, or that one parent happened to be in an institution when the child was born."<sup>142</sup> With respect to the retention of case records, the standards stated that records "should preserve information about the child and his family which can be made available when needed."<sup>143</sup> Elsewhere, the standards advised agencies to be prepared to offer follow-up services after the adoption: "In cases in which children or parents return for information or assistance, the agency should find out about the situation and give help with concerns related specifically to adoption, as

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137. CHILD WELFARE LEAGUE OF AM., STANDARDS FOR CHILDREN'S ORGANIZATIONS PROVIDING FOSTER FAMILY CARE 36 (1941) [hereinafter FOSTER FAMILY CARE STANDARDS].

138. *Id.*

139. 1958 STANDARDS, *supra* note 135, at 31.

140. *Id.* at 59-60.

141. FOSTER FAMILY CARE STANDARDS, *supra* note 137, at 35.

142. 1958 STANDARDS, *supra* note 135, at 64-65.

143. *Id.* at 47.

for example a child's request to know about his natural parents."<sup>144</sup>

One would expect to find in secondary legal authorities from the 1920s through the 1960s prescriptions for and critiques of changes in adoption law, for this was a period of rapid and frequent changes in the law. Between 1925 and 1935 alone, one report noted that "39 states enacted new adoption laws or amended existing legislation to reflect in whole or in part the recommendations made by the Children's Bureau."<sup>145</sup> Between 1940 and 1945, it was reported that "forty states . . . improved their adoption legislation."<sup>146</sup> A 1951 report from a Child Welfare League workshop reported that "since 1948 we find that half the states have amended their adoption laws. Seven states have re-enacted their adoption laws and in this brief period one state has done so for the second time."<sup>147</sup>

Among law reviews and bar journals published from the 1920s through the 1960s, there are numerous commentaries on adoption laws. A survey of most of those articles, however, revealed relatively little about confidentiality and secrecy in the adoption process. The most frequently addressed subjects are inheritance,<sup>148</sup> independent adoptions,<sup>149</sup> and "black market" adoptions.<sup>150</sup> There are also general reviews of state laws and procedures,<sup>151</sup> and articles on a wide smattering of other topics.<sup>152</sup> When articles do touch on the subject of se-

144. *Id.* at 30.

145. ZIETZ, *supra* note 3, at 133.

146. Morlock, *supra* note 107, at 68.

147. Child Welfare League of Am., *Adoption Practices, Procedures and Problems: A Report of the Second Workshop Held in New York City May 10, 12, 1951*, at 16 (1951).

148. *See, e.g., supra* notes 169-79 and accompanying text. This is by far the most frequently addressed topic through the 1960s.

149. An independent placement is one in which a child is placed in the adoptive home by parents, friends, relatives, physicians, lawyers, or others without the aid of a recognized child-placing agency. An "agency placement" is one in which a child is relinquished by his own parent or parents to a licensed child-placing agency with the agency assuming responsibility for the child's interim care and for the selection of the child's new and permanent legal family.

DOROTHY ZIETZ, *CHILD WELFARE: SERVICES AND PERSPECTIVES* 104-05 (1969) (citing CAL. STATE DEPT OF SOC. WELFARE, *ADOPTING A CHILD IN CALIFORNIA* 3 (1968)).

150. *See, e.g.,* Philip B. Gilliam, *The 1951 Amendments to the Relinquishment and Adoption Laws*, 28 *DICTA* 227 (1951); Robert Taft, Jr., *Some Problems Under The Adoption Laws of Ohio*, 13 *OHIO ST. L.J.* 48 (1952); Jacobus TenBroek, *California's Adoption Law and Programs*, 6 *HASTINGS L.J.* 261 (1955); *Moppets on the Market*, *supra* note 43.

151. *See, e.g.,* Julian Bamberger, *Adoption in Indiana*, 17 *IND. L.J.* 225 (1942); Eugene M. Haertle, *Wisconsin Adoption Law and Procedure*, 33 *MARQ. L. REV.* 37 (1949); Rush H. Limbaugh, *The Adoption of Children in Missouri*, 2 *MO. L. REV.* 300 (1937); Curt Charles Silberman, *Adoption in New Jersey—An Analysis of Its Legal Effects and Consequences*, 1 *RUTGERS L. REV.* 250 (1947).

152. *See, e.g.,* Charles H. Miller, *The Lawyer's Place in Adoptions*, 21 *TENN. L. REV.*

crecy provisions, authors consistently cite the need to prevent adoptive and natural parents who are unknown to one another from learning one another's identity, in order to protect adoptive parents and adopted children from the possible danger of interfering or harassing natural parents. There appear to be no suggestions of a need on the part of birth parents to be protected against later discovery by adoptees. In a comprehensive 1950 *Yale Law Journal* comment on adoption regulation, the author discussed one danger of independently arranged versus agency-mediated adoptions: "Since the identities of natural and adoptive parents are seldom concealed from one another, adoptive parents are frequently harassed by a mother who has changed her mind and wants her child back."<sup>153</sup> A comment in 1951 on new Texas legislation explained approvingly that under new procedures for giving consent to adoption, it "is now possible for the identity of the adopted parents to be concealed from the natural parents and for the identity of the natural parents to be concealed from the adopted parents, when the child is adopted through a licensed placement agency."<sup>154</sup> A report about and analysis of Pennsylvania's 1954 legislation opined in the same vein that "[i]t is agreed that it is best for all parties if the natural parent does not know the identity of the adoptive parents."<sup>155</sup> Therefore, a statutory provision for giving consent outside of and before the adoption hearing has the favorable result that "the adoptive parents need no longer fear subsequent contacts with the natural parent."<sup>156</sup> Another commentary on the same legislation concurred: "A family adopting a child released under such circumstances has the safeguard of a guarantee that in the future the natural parents cannot disturb their happiness by the assertion of any rights in the child."<sup>157</sup> In a 1955 *Iowa Law Review* symposium issue on adoption, one of the authors wrote that "[w]hen the natural parents do not know where the child is placed, it seems inadvisable to permit them to secure that information."<sup>158</sup> He also commented, "[i]t is unfortunate that sometimes [birth] parents appear to be prom-

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630 (1951); Joseph W. Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 MINN. L. REV. 605 (1927) (judicial interpretation of adoption laws, and jurisdiction); Paul Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U. L. REV. 649 (1959); Walter Wadlington, *The Divorced Parent and Consent for Adoption*, 36 U. CIN. L. REV. 196 (1967).

153. *Moppets on the Market*, *supra* note 43, at 724.

154. William H. Borchers, Recent Statute, *Texas Adoption Statute—Amendments to Articles 46A and 46B*, 4 BAYLOR L. REV. 117, 119 (1951).

155. Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. PA. L. REV. 759, 770 (1954).

156. *Id.* at 771.

157. Edward Goldman, *Legislation, Adoption: New Law, New Problems*, 59 DICK. L. REV. 57, 59 (1954).

158. Harvey Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228, 282 n.228 (1955).

ised that they may visit children when they consent to the adoption. This is a practice which no respectable agency would countenance."<sup>159</sup>

On the other hand, a 1955 article on California law approved of a procedure in independent adoptions under which a natural parent may see the names of the adopters because the procedure may prevent "black market evils"; but, the article noted, this procedure "embodies what otherwise is regarded as a bad practice."<sup>160</sup> A 1956 Los Angeles Bar Association report on California law expressed a somewhat contrary view, suggesting it would be sufficient if the natural mother knew everything she wanted to know about the adopting parents except identifying information because "it is better for the child, better for the adopting parents, and better for the natural mother if she does not know the names, address and telephone number of the adopting parents."<sup>161</sup> If she insists, the report concluded, she should have a right to this information but the adopting parents should know that their identity would be disclosed.<sup>162</sup>

A decade later, a law review comment on inheritance rights explained that anonymity was needed to "protect the adoptive parents from the possibility of harassment by the natural parents who may seek return of their child."<sup>163</sup> The purpose "is to effect a complete emotional break between the child and the natural parents . . . [and it] tends to lessen the *fears* on the part of the adoptive parent that the natural parents will attempt to take the child away from them."<sup>164</sup> Similarly, in a 1969 review of adoption law throughout the nation, the chair of the American Bar Association Family Law Section's Committee on Adoption articulated as the rationale for secrecy in adoption the protection of "the adopted child and his adoptive parents from possible harassment and invasions of privacy."<sup>165</sup> The chair continued, suggesting just how far some states were going to protect against this possible harassment: "Indeed, under many statutes, adoptive parents are not allowed to discover the real identity of the child they adopted through an authorized adoption agency."<sup>166</sup> In New York, a highly atypical jurisdiction with regard to how early it had

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159. *Id.* (citing Note, *Enforcement of Pre-Adoption Promises to Allow Post-Adoption Visitation of Child by Natural Parents*, 16 IOWA L. REV. 538, 540 (1931)).

160. TenBroek, *supra* note 150, at 340.

161. L.A. Bar Ass'n, *Report and Recommendations of the Association's 1955 Special Committee on Adoptions, Concerning Anonymity of Adopting Parents*, 31 L.A. BAR ASS'N BULL. 327, 327-28 (1956).

162. *Id.*

163. Paul A. Kiefer, Comment, *Intestate Succession, Sociology and the Adopted Child*, 11 VILL. L. REV. 392, 394-95 (1966).

164. *Id.* at 395.

165. Felix Infausto, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions*, 3 FAM. L.Q. 123, 137 (1969).

166. *Id.*

closed court and birth records to all,<sup>167</sup> it was not until 1968 that the legislature took steps to ensure that in agency adoptions adoptive parents could not learn the surname of the child.<sup>168</sup>

One related area of adoption law that was discussed frequently in legal periodicals was inheritance by and through adopted children,<sup>169</sup> no doubt because it involves contests over property. The discussions of inheritance suggest that through the 1960s, the laws of many states, while providing for natural parents and adoptive parents to remain unknown to one another, did not necessarily contemplate a total legal separation between adopted children and their birth relatives. Before 1935, adopted children were permitted to inherit from their adoptive parents, although they were generally unable to inherit from relatives of the adoptive parents. Adopted children were usually permitted to inherit from their birth parents as well as from other birth relatives.<sup>170</sup> Only modest changes had occurred by 1943 when a survey of the law concluded that "there is still a reluctance to permit the adoptee to inherit from the adoptor's relatives. It is . . . possible to discern the beginning of a movement to deny the child's right to inherit from the natural parents . . ."<sup>171</sup> It was reported then that five states expressly denied adoptees the right to inherit from natural parents, twelve states expressly permitted them to, and in the thirty-two states without statutory provisions, "[t]he generally applicable rule is that the adoption should not be held to deprive the adoptee of the right to inherit from natural

167. See *supra* notes 8, 36-59 and accompanying text.

168. See 1968 N.Y. Laws 2951 (amending adoption relations law).

169. . . See, e.g., Bamberger, *supra* note 151, at 233-35; Emilio S. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152 (1966); Limbaugh, *supra* note 151, at 311-12; Silberman, *supra* note 151, at 275-81; Recent Decision, *Descents and Distributions—Natural Mother of Adopted Child Preferred to Father of Adoptive Parents*, 12 VA. L. REV. 511 (1926); Note, *Inheritance by Adopted Child in Dual Capacity*, 41 ILL. L. REV. 466 (1946); Donald F. Pierce, Comment, *Inheritance by, Through, and from an Adopted Child*, 9 ALA. L. REV. 35 (1956).

170. See Pierce, *supra* note 169, at 36. In addition:

Provisions for inheritance from the child by the adoptive parents and their kindred were found in thirty-two jurisdictions. The general tendency of the courts, in the absence of an express denial of the right of inheritance, was to allow the adoptive parents to inherit, limiting the property they took to that which the child acquired from or through them. Natural parents and kin were denied the right to inherit from the child in four jurisdictions. They were usually allowed to inherit in all others. Property received by the child, after his adoption, was normally excepted from inheritance by the natural kin.

*Id.*

171. Fred L. Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L.Q. 221, 232 (1943).

relatives."<sup>172</sup>

By 1956, seven states were said to be following the provision of the Model Probate Code of 1946, under which adopted children, for inheritance purposes, are treated as if they are the natural children of their adoptive parents and are no longer considered the children of their natural parents.<sup>173</sup> However, recent legislation was also reported in another seven states under which adopted children retained the right to inherit from natural parents.<sup>174</sup> By 1970, many more states, but apparently still fewer than half, prohibited adopted children from inheriting from their natural relatives. "[T]wenty-one states now expressly prohibit an adopted child from inheriting the estate of his intestate natural parents, ten other states statutorily allow the inheritance and the remaining 19 states have no statute dealing with the question."<sup>175</sup> In the states without these statutes, "courts have almost uniformly permitted the adopted child to inherit from his intestate natural parents."<sup>176</sup> Although the uniform code<sup>177</sup> and many commentators recommended that states treat adoptees, for inheritance purposes, like the natural children of their adoptive parents, eliminating their right to inherit from natural relatives,<sup>178</sup> a majority of the states had not done so by 1970.<sup>179</sup>

In the general body of social services and other social science literature through the 1960s, the reasons given to support secrecy in adoption proceedings were similar both to those officially proffered by the Children's Bureau and the Child Welfare League of America<sup>180</sup> and to those expounded in the legal literature. Authors stressed the importance of keeping the identities of birth parents and adoptive parents unknown to one another.<sup>181</sup> They also described the confidentiality concern associated with original birth records as a concern

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172. *Id.* at 237. The author also noted that "[a]n increasing number of states accord intestacy rights to the adoptive parents and relatives," and that there is a "pronounced tendency to cut off the natural parents' right to succeed to the intestate estate of the adoptee." *Id.* at 232.

173. See Pierce, *supra* note 169, at 37.

174. See *id.* at 37-38.

175. Note, *The Adopted Child's Inheritance from Intestate Natural Parents*, 55 IOWA L. REV. 739 (1970) (footnotes omitted).

176. *Id.* at 740.

177. See *supra* note 173.

178. See, e.g., Kuhlman, *supra* note 169, at 249; Pierce, *supra* note 169, at 40.

179. See *supra* notes 175-76.

180. Some authors were affiliated with or published by these influential organizations, or both. See *supra* notes 2, 107. The periodical *Child Welfare* is published by the Child Welfare League of America.

181. See, e.g., Heisterman, *supra* note 40, at 289; Madison, *Adoption: Yesterday, Today, and Tomorrow—Part II*, 45 CHILD WELFARE 341, 344 (1966); Morlock, *supra* note 107, at 67-69.

only that the adopted child be protected "from any stigmatizing identification on his birth certificate," and a few discussed the importance of adult adoptees' rights to information about their birth families.<sup>182</sup>

In this literature, there are many comments concerning the likelihood that adopted children will be curious about their birth families, and there is nearly universal agreement that adoptive parents should tell children they are adopted. In contrast to an explosion of articles beginning in the 1970s,<sup>183</sup> there is little discussion of desire on the part of adult adoptees to seek either information about or contact with birth relatives, and there is apparently no discussion of any efforts by adoptees to do so. There is therefore no discussion of harms or benefits that might accrue to adoptees or their birth parents from such efforts. As in the legal literature, there also appears to be no discussion of the desirability of legislation to close original birth records to adult adoptees. This may be in part because there had not yet been a sizeable number of adult adoptees who had made such efforts, nor a sizeable number who had encountered and protested closed birth records.<sup>184</sup> There was a huge increase in the popularity and number of adoptions after World War II,<sup>185</sup> and many states did not close birth records to adult adoptees until later than previously thought.<sup>186</sup> Furthermore, in a social context in which adoption was increasingly viewed as a perfect and complete substitute for creating a family by childbirth,<sup>187</sup> it may be that in the 1950s and 1960s, many observers and commentators simply did not anticipate that any significant number of adult adoptees would wish to obtain identifying information about their birth families.

With respect to telling children they are adopted, there were de-

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182. ZIETZ, *supra* note 3, at 371; *see also* Huffman, *Importance*, *supra* note 45, at 351, 357; Morlock, *supra* note 107, at 67.

183. *See, e.g.*, HUFFMAN, *Importance*, *supra* note 45, at 356, 358. She wrote in 1947 that "[t]oo frequently in the past we have neglected the child's right to a document linking his original and adoptive identities." *Id.* at 356. Further, she argued that this information should be available "at the request of the adopted person when of age." *Id.* at 358; *see also* E. Wellisch, *Children Without Genealogy—A Problem of Adoption*, 13 MENTAL HEALTH 41, 41 (1952); Helen Cominas, *Minimizing the Risks of Adoption Through Knowledge*, 16 SOCIAL WORK 73, 79 (1971).

184. *See supra* notes 351-59.

185. Petitions to adopt rose from 16,000 in 1934 to 50,000 in 1944, and by the year 1962, to 121,000, of which fifty-two percent were filed by non-relatives. *See* Bernice Q. Madison, *Adoption—Yesterday, Today, and Tomorrow*, 1965 CONF. SOC. WORK 205, 206-07.

186. *See supra* Part II. A social worker and open records advocate noted in 1979, "[t]he fact that sealed records are a relatively recent phenomenon is confirmed by the fact that adopted persons who are now in their thirties represent the first generation to have had their birth records sealed at adoption." Joanne W. Small, *Discrimination Against the Adoptee*, 37 PUB. WELFARE, Summer 1979, at 38, 40.

187. *See infra* notes 223-56 and accompanying text.



bates about how and at what age to tell, but most social service and other social science literature recommended telling, and much of it recommended telling at a very young age.<sup>188</sup> As a 1958 U.S. Children's Bureau pamphlet for prospective adoptive parents explained, the child should be told, "[f]or someday, somehow, he'll learn. So you be the one to tell him first. He loves and trusts you. If he first learns from an outsider, it may seriously affect his feelings toward you. Let him know from the beginning."<sup>189</sup> The pamphlet went on to advise: "As he grows up he will want and need to know some of his own family history. Agencies will help with this if you wish."<sup>190</sup> During this period, professional literature "tended to accept as a given that the adoptee would never know the true facts or identity of the birthparents."<sup>191</sup> The notion of a search by an adoptee "was usually viewed as fantasied or symbolic rather than literal."<sup>192</sup> A book of advice for adoptive parents, for example, simply reassured them not to become "needlessly concerned" because sometimes an adopted adolescent may ask where his birth parents are. All children sometimes feel that they are misunderstood, the authors explained, and that "somewhere in the world there must be the ideal parents."<sup>193</sup> Parents with biological children see this "as a very unreal, passing, momentary thought," while adoptive parents can mistake it for reality and think that their child is yearning for his biological parents.<sup>194</sup> Perspective adoptive parents are similarly told in another book that if they communicate openly with their adopted children and empathize with the situations of the children and their children's birth parents, then their children's fantasies about "real" parents, although they "are bound to be stronger than those of the biological child, for they have grounding in reality . . . need not be much stronger."<sup>195</sup>

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188. See, e.g., BROOKS & BROOKS, *supra* note 42, at 183-87; CARP, *supra* note 5, at 124-37; FOSTER FAMILY CARE STANDARDS, *supra* note 137, at 35 (stating that adoptive parents must "agree to tell the child that he is adopted"); RAELE JEAN ISAAC, ADOPTING A CHILD TODAY 172 (1965); FLORENCE RONDELL & RUTH MICHAELS, THE ADOPTED FAMILY, YOU AND YOUR CHILD: A GUIDE FOR ADOPTIVE PARENTS 24-27 (rev. ed. 1965); JOHN TRISELIOTIS, IN SEARCH OF ORIGINS, THE EXPERIENCE OF ADOPTED PEOPLE 2-6 (1973); Madison, *supra* note 185, at 211-12.

189. U.S. CHILDREN'S BUREAU, U.S. DEPT OF HEALTH, EDUC., & WELFARE, WHEN YOU ADOPT A CHILD 23-24 (1958).

190. *Id.* at 25.

191. Marshall D. Schechter & Doris Bertocci, *The Meaning of the Search*, in THE PSYCHOLOGY OF ADOPTION 62, 65 (David M. Prodzinsky & Marshall D. Schechter, eds., 1990). The authors noted that "search ideation was generally presumed to be particularly salient during the developmental phase associated with consolidating identity, that is, adolescence." *Id.* at 65-66.

192. *Id.* at 65.

193. RONDELL & MICHAELS, *supra* note 188, at 54-55.

194. *Id.*

195. ISAAC, *supra* note 188, at 188-92. Isaac relied on the work of Canadian sociolo-

With respect to secrecy and the desires of unmarried mothers, there are indications in the social service and other social science literature in this period that unmarried mothers sought a measure of confidentiality. A careful examination of the literature, however, reveals the kind of protection they urgently sought and makes clear that it was not protection from the discovery of their identity by their surrendered children as adults.<sup>196</sup> As in the legal literature,<sup>197</sup> there are statements that agency-arranged, rather than independently-arranged, adoptions better facilitate one kind of secrecy—keeping the identities of adoptive parents and birth parents unknown to one another. For example, in arguing for the superiority of agency to independent adoptions, U.S. Children's Bureau consultant Maud Morlock explained in a social work journal: When an unmarried mother gives her rights to an agency, "this action protects the future security of the adoptive home, for the identity of the adoptive parents can be concealed from her."<sup>198</sup> A book of advice for adoptive parents exhorts: "Only an agency can act as a blank and impenetrable wall between the identities of natural and adopting parents. Unfortunately, not even a doctor or a lawyer can guarantee this anonymity to both sides!"<sup>199</sup>

In the social service literature, however, there are also many suggestions that agencies, as part of their efforts to promote agency-

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gist and adoptive father, H. David Kirk, whose 1964 book *Shared Fate* criticized what he characterized as the prevailing "rejection-of-difference" orientation of adoptive parents and argued that adoptive families are more successful when they acknowledge and are open to communication about their differences from biological families. See H. DAVID KIRK, *SHARED FATE* 98-99 (1964). Even Kirk, however, did not discuss in that book whether adoptees might wish to seek identifying information about or contact with their birth families, although he did quote a clinical case study that contrasted adoptive parents who made their child feel as if the subject of adoption could not be discussed—parents to whom the child did not feel close—with adoptive parents who gave their adopted child information about her origins and who "had a free-flowing" kind of relationship with her. *Id.* at 97-98. The latter parents' child "was not in conflict and was not interested to know if there was more to be learned about her original parents." *Id.* at 97 (quoting a clinical report).

196. In historian Carp's study of the treatment of adoption agency records, he did not distinguish between birth mothers' desires to conceal their situations from their families and communities, and birth mothers' attitudes with respect to their children obtaining identifying information when the children become adults. He asserted that "it was unwed mothers themselves who had originally demanded secrecy," meaning secrecy that included lifelong anonymity, but he did not describe any documentary evidence in support of his assertion. CARP, *supra* note 5, at 112.

197. For examples of such statements in the legal literature, see L.A. Bar Ass'n, *supra* note 161, at 327; TenBroek, *supra* note 150, at 320; William H. Borchers, Note, *Texas Adoption Statute*, 4 BAYLOR L. REV. 117, 119 (1951); Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. PENN. L. REV. 759, 771-72 (1954).

198. Morlock, *supra* note 107, at 69; see also CARP, *supra* note 5, at 113.

199. CARL DOSS & HELEN DOSS, *IF YOU ADOPT A CHILD* 72 (1957).

arranged adoption, should provide birth mothers with *the greater measure of confidentiality that they often enjoyed in independent adoptions*.<sup>200</sup> This apparent contradiction can be resolved by understanding the kind of confidentiality birth mothers were seeking. They sought arrangements that would conceal their pregnancies from their parents or from other members of their communities, or from both, rather than arrangements that would necessarily conceal their identity from adoptive parents, or by extension, from their surrendered children when those children reached adulthood. Their predicament, explained in a 1959 account, was that when an unmarried mother left her home community to seek assistance from an agency elsewhere, she might encounter public and private agencies that would not serve nonresidents, or often she might be told that it was necessary to *inform her home community's* public welfare department. These practices discouraged unmarried mothers from using agency services, and therefore encouraged black market activities through which, to the detriment of children, "many couples who are rejected by recognized adoption agencies . . . find children available to them through illegal channels."<sup>201</sup> A book on adoption for perspective adoptive parents similarly explained that among the reasons an unmarried mother may not turn to social agencies is the fact that if she is financially needy, most agencies refer her to the welfare department where she learns she may have to start a paternity suit and "get up in a public court to relate her story in all its embarrassing detail."<sup>202</sup> An unmarried mother may also be "warned that an investigator might go to her parents to learn if they could contribute to her support, even though she insisted that at all costs the fact of her pregnancy must be kept from her family."<sup>203</sup>

#### IV. SOCIAL CONTEXTS AND ADOPTEES' ACCESS TO BIRTH RECORDS

It is difficult, in sum, to find through the 1960s expressions of specific reasons for closing original birth records to adult adoptees, either in the publications of public and private agencies or in the writings of legal and of social service and other social science authorities, although one frequently finds advanced in such sources

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200. See *infra* notes 201-03.

201. ZIETZ, *supra* note 3, at 368.

202. ISAAC, *supra* note 188, at 66.

203. *Id.* Similarly, the report on a 1955 conference sponsored by the U.S. Children's Bureau emphasized that "[c]onfidentiality is the key to service to the unmarried mother. The lack of confidentiality, more than any other single factor, drives girls to independent plans." PROTECTING CHILDREN IN ADOPTION, *supra* note 108, at 33. The report explained that public agencies may be required to notify other people of the pregnancy, and that unmarried mothers thought both that they may have to give information about their residences and families, and that agency records may be open to public inspection. See *id.* at 11, 30-31; see also CARP, *supra* note 5, at 111-15.

specific reasons for closing *court records* to all persons and for closing original *birth records* to all persons except adult adoptees. Why then did almost all states close these birth records, albeit more slowly and later than has generally been believed? Some reasons can be identified by analyzing the complex ways in which law both reflects and, in turn, affects social attitudes and understandings, that is, the ways in which law reflects and affects the social context in which it exists.

A helpful theoretical apparatus for such an analysis is provided in aspects of the "law and society" framework explicated by Lawrence Lessig in his article *The Regulation of Social Meaning*.<sup>204</sup> Professor Lessig describes individuals' acts—acts such as an adoptee's expressing interest in obtaining identifying information about or contact with birth relatives—as having social meanings, either a single meaning or a "range or distribution of meanings."<sup>205</sup> The social meanings of acts are, of course, a function of their social context, of "the collection of understandings or expectations shared by some group at a particular time and place."<sup>206</sup> The more the group's understandings or expectations "appear natural, or necessary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be."<sup>207</sup> The social meanings of acts are both constructed by and construct the social context, and governmental actions as well as the collective action of individuals can play a role in the construction of social meanings.<sup>208</sup>

For example, as applied to this history of adoption, the early actions of state governments making access to adoption records unlawful in some circumstances may be understood as an unintentional instance of one of the techniques Professor Lessig describes for affecting social meanings.<sup>209</sup> The states' acts of "tying" the stigma of illegality to the availability of identifying information under some circumstances may have contributed to changing the social meaning of seeking identifying information under other circumstances, thus making searches by adult adoptees appear to be unnatural and wrong, to be failures of the adoption process.<sup>210</sup> In turn, such changes in social meaning likely affected social attitudes and understandings, helping to foster an understanding that lifelong secrecy was an essential feature of adoption. Similarly, but to opposite effect, the more recent actions of individuals and groups seeking greater openness in adoption

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204. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

205. *Id.* at 955.

206. *Id.* at 958.

207. *Id.* at 960-61.

208. *See id.* at 962-86.

209. *See id.* at 1009-10.

210. *See infra* Part IV.A.

may be understood as efforts to use "tying" for the more difficult task of overcoming "the existing structures of social stigma."<sup>211</sup> Adoptees' expression of interest in their origins may be de-stigmatized, that is, made to seem more sympathetic and natural, more right than wrong, both by providing mutual support to searching adoptees and birth relatives and by connecting their interest in their origins with compelling stories about urgent searches that have resulted in successful outcomes. "Re-changing" the social meanings of actions in this way, and in turn the social attitudes and understandings of which they are a function, may then advance the goal of legislative change. Finally, the actions of those state governments that foreclosed adult adoptee access to birth records in the thirty years after 1960 may be understood as a part of what Professor Lessig calls a "defensive construction" of social meanings, that is, an attempt to "preserv[e] an old meaning"<sup>212</sup> when it is threatened.<sup>213</sup>

The use of this social context and meanings framework is intended to shed some new light on the history of adult adoptee access to birth records. It is not intended to suggest that other analytical approaches may not be equally illuminating, such as an analysis of the roles played by and the power relationships among interest groups.<sup>214</sup> Adoption attorneys and adoption agency officials had financial and institutional incentives to satisfy prospective adoptive parents' desires to have children who are as much "their own" as possible and, therefore, connected to other families as little as possible. The agencies and attorneys may also have had financial and institutional incentives to conduct adoption arrangements with a minimal possibility of future scrutiny. In any analysis of the roles played by actors such as attorneys and agency officials in the passage and maintenance of laws, however, social attitudes and understandings would remain a significant factor.

#### A. *Through the 1960s*

You have no right to any information whatsoever. You were adopted legally . . . . You had no other parents.<sup>215</sup>

—Adoptee Florence Fisher, quoting a remark made in 1951 by the lawyer who had arranged her adoption.

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211. Lessig, *supra* note 204, at 999.

212. *Id.* at 987.

213. See *infra* Part IV.B.

214. For an example of such an approach in an analysis of laws regulating trans-racial adoptions, see Ruth Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677 (1999).

215. FLORENCE FISHER, *THE SEARCH FOR ANNA FISHER* 84 (1973) (recounting an interview in New York City).

Your need to look for your mother is neurotic. You are rationalizing why you must know who your 'real' parents, as you call them, are.<sup>216</sup>

—Adoptee Betty Jean Lifton, quoting a remark made in the mid-1950s by a psychiatrist she had consulted during her search.

The paucity of explicit reasons articulated through the 1960s for eliminating adult adoptee access to birth records suggests that when many court records were sealed and some original birth records were sealed even from adult adoptees, the closings of the birth records to adult adoptees reflected emerging attitudes and understandings, a social context, and not a legislative response to real or imagined problems associated with such access. Adoption was coming to be seen as a perfect or complete substitute for the creation of families through childbirth,<sup>217</sup> and the sealing of records in some states even to adult adoptees may have been undertaken as a step consonant with this understanding. Over time, as most states passed laws sealing records from the parties, except adult adoptees, this new legal regime of partial secrecy may itself have affected the evolution of the social context.

The specific rationale for closing records to the parties was to prevent the possibility of birth parents interfering with adoptive families.<sup>218</sup> But as most states proceeded to tie the stigma of illegality to the availability of adoption records to birth parents, adoptive parents, and *minor* adoptees, the states may also have affected social attitudes and understandings associated with *adult* adoptee access to records. The act by an adoptee of expressing interest in his or her birth family began to acquire negative social meanings. As discussed below, adoptees interested in learning about their families of origin began to experience strong social constraints: those who sought such information were met in many quarters with disapprobation and were even regarded as psychologically disturbed.<sup>219</sup> Ultimately, an expectation of lifelong secrecy among the parties seems to have become firmly established, an expectation that both reflected and fostered the negative social meanings associated with adoptees seeking information.<sup>220</sup> Lifelong secrecy apparently came to "appear natural, or necessary, or uncontested,"<sup>221</sup> so natural, necessary, or uncontested that eventually the distinction between sealing court records from all

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216. BETTY JEAN LIFTON, *TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER* 108 (1977) (recounting a consultation with a psychiatrist in Cambridge, Massachusetts, when she was searching for her birth mother).

217. See *infra* notes 223-56 and accompanying text.

218. See *supra* Part III.

219. See *infra* notes 258-69 and accompanying text.

220. See *infra* notes 271-84 and accompanying text; Part IV.B.

221. Lessig, *supra* note 204, at 960-61.

inspection and sealing birth records from inspection even by adult adoptees became lost. Recent history forgotten, "closed records" came to be written and thought about in a unitary sense.<sup>222</sup>

The social understanding that was probably reflected in the earliest closings of birth records to adult adoptees was that adoption was a perfect and complete substitute for the creation of families through childbirth. The new birth certificate issued after adoption substituted the adoptive parents' names for the birth parents' names, "showing . . . the adoptive parents as the real parents," as one law review article explained.<sup>223</sup> The law could confer on children in need of families new identities that would obliterate forever their original identities, and the law could provide adoptive parents with children who, like children born to them, would have no connection to any other family. This idea of adoption was facilitated by a partial swing of the pendulum away from nature and closer to nurture as the basis of human development.<sup>224</sup> The idea also was in keeping in the immediate post-World War II years with both a pro-family, pro-natal ideology,<sup>225</sup> and a complementary notion that young, white unmarried mothers, by giving up their babies for adoption, could overcome the psychological problems that had led to their predicaments and make fresh starts in their lives.<sup>226</sup>

The understanding of adoption as a perfect and complete substitute for creating a family through birth was discernable in the practices of many adoption agencies, practices that embodied "the myth that once the adoption was legalized . . . the child would be the same 'as if born' to the adopting parents."<sup>227</sup> In the mid-1950s, many agencies tried "to match physical characteristics of adoptee and adopters as well as the presumed intellectual capacity, educational background, and socioeconomic status of the potential adoptive couple and the birth parents. Religion matching was also common as were age restrictions for the applicant couple."<sup>228</sup> In the eyes of a contemporary critic, sociologist, and adoptive parent H. David Kirk, these

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222. See *infra* notes 271-84, 359-74.

223. Haertle, *supra* note 151, at 43.

224. See *infra* notes 232-36 and accompanying text.

225. See *infra* notes 237-44 and accompanying text.

226. See *infra* notes 245-56 and accompanying text.

227. Janette Thompson, *Roots and Rights—A Challenge for Adoption*, SOC. WORKER 13, 13 (1979) (reporting a study by the Children's Aid Society of Metro Toronto, Canada). The author notes that adoptive parents were encouraged to tell children of their adoption, but then were offered little help. Adopting parents received "euphemistically" presented birth history "to ensure the complete acceptance of the child's past by the adopters in the hope that this would permit a lasting bond to develop. A worthwhile hope—but one which ignored the fact that the history actually belonged to the child." *Id.*

228. Sokoloff, *supra* note 31, at 23.

and other practices, although not necessarily undesirable in themselves, reinforced what he considered to be an unhealthy but predominant "rejection-of-difference" orientation of adoptive parents. Additional agency practices he identified as encouraging this type of orientation were: not providing services after legalization of the adoption, revealing limited information about children's background, placing children at a geographical distance from their birth parents, and keeping records confidential. Influenced by this rejection-of-difference orientation, adoptive parents, even when telling children of their adoption, were hesitant to acknowledge that there might be any significant differences between adoptive and biological families.<sup>229</sup> To another, later observer, the agency practice in the 1950s of placing infants at a younger age than formerly, while it "grew up in response to theory about what was best for the children, . . . reinforced the adoptive parents' denial that adoptive parenting was significantly different from biological parenting."<sup>230</sup>

Among legal commentators, the view was expressed that adopted children should be on an identical legal footing with biological children. Thus, a number of writers criticized the inheritance laws of the time that limited adoptive children's rights to inherit through their adoptive relatives and permitted adopted children to continue inheriting from birth relatives. "In legal and social contemplation the child is taken from his natural family and made a member of a new family with full standing as though one of its blood." The laws of inheritance therefore should be "in furtherance of the currently prevailing social attitude that adoption effects a complete substitution of families."<sup>231</sup>

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229. See KIRK, *supra* note 195, at 152-53. His research suggested that acknowledgment of differences in coping activities "are conducive to good communication and thus to order and dynamic stability in adoptive families," whereas rejection of differences "can be expected to make for poor communication with subsequent disruptive results for the adoptive relationship." *Id.* at 93. Kirk's book, as well as an empirical study in the early 1960s that noted that a greater proportion of adopted children sought mental health services, are credited with first stimulating widespread interest in the psychology of adoption. See David M. Brodzinsky & Marshall D. Schechter, *Preface to THE PSYCHOLOGY OF ADOPTION*, *supra* note 191, at ix, x. Although Kirk's theory has been criticized,

its importance cannot be denied. For one thing, it represented the first major theoretical effort to conceptualize adoptive family life, in contrast to earlier psychoanalytic writings on adoption which generally focused on the individual dynamics of children and parents. It also helped to normalize many of the adjustment difficulties among adoptees and adoptive parents. Finally, the theory was of critical importance in opening up the adoption process.

*Id.* at x-xi.

230. Kenneth W. Watson, *Who Is the Primary Client?*, PUB. WELFARE, Summer 1979, at 11-12.

231. Uhlenhopp, *supra* note 158, at 285 (asserting in inheritance context that relationship with natural parents be severed to promote "the completeness of the adoptive relationship"); Kuhlmann, *supra* note 171, at 248-49; see also, Recent Case, *Adoption—*



The understanding of adoption as a perfect and complete substitute for creating a family through childbirth was supported by the partial swing of the pendulum in the first half of the century away from nature and toward nurture. A 1939 book that is part advice to prospective adopters and part academic study noted a former tendency "to stress heredity and to discount environment"<sup>232</sup> and advised instead: "What is done with a child after he is born counts more than the circumstances of his birth. He holds possibilities within himself which parental influence and general environment can either develop or crush. To Nature must be added Nurture."<sup>233</sup> Identifying this swing toward nurture is not to suggest, of course, that potential adoptees were not carefully screened by agencies for mental or physical defects and "the grosser hereditary or congenital taints."<sup>234</sup> But apparently, this kind of pro-nurture advice was influential. "Adoptions are popular," the U.S. Children's Bureau proclaimed in 1955. "This widespread interest reflects a drastic change in attitude during the past two or three decades."<sup>235</sup> A professor of social welfare explained in 1959 that the demand for children to adopt had greatly increased when the behavioral sciences could reliably assure adoptive parents that "parental morality or immorality was not genetically transmitted, that the adopted child would reflect their behavior and attitudes rather than those of his natural parents, and that the child's illegitimate birth status was not tantamount to his becoming a criminal, a sexual psychopath, or some other type of deviant."<sup>236</sup>

The understanding of adoption as a perfect and complete substi-

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*Descent and Distribution—Right to Inherit in a Dual Capacity When Adoptive Parent Is Blood Relative*, 30 MINN. L. REV. 395, 396 (1946) (arguing that inheritance through natural parents should not be permitted in order to further the notion that the adoptee be given complete legal status as a child of the adopting parents); Kiefer, *supra* note 163, at 402-03 (alleging that failure to allow adoptive parents and relatives to inherit from adopted child stems from a failure to understand the necessity of "effecting a complete substitution of the adoptive for the natural parents").

232. BROOKS & BROOKS, *supra* note 42, at 12.

233. *Id.* at 16.

234. *Id.* at 21; *see also* Sokoloff, *supra* note 31, at 23.

235. PROTECTING CHILDREN, *supra* note 108, at 5. For a discussion of the pro-traditional family, pro-natal ideology in the post-World War II period that was another factor contributing to the increasing popularity of adoption, *see infra* notes 237-44 and accompanying text.

236. ZIETZ, *supra* note 3, at 366. Reassurance was also provided to adopters by the psychological explanations that developed in the 1940s and 1950s for white unmarried mothers' pregnancies: "The biological stain of illegitimacy had been permanent, but the neuroses of illegitimacy could be removed with help from a caseworker. The white out-of-wedlock child, therefore, was no longer a flawed by-product of innate immorality and low intelligence." RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* 152 (1992); *see infra* notes 245-56 and accompanying text.

tute for creating a family through childbirth was also encouraged in the immediate post-World War II generation, in the aftermath of wartime social and economic dislocations, by a pervasive pro-traditional family and pro-natal ideology. In the light of this "post war family imperative,"<sup>237</sup> adoption conferred the dual social benefit of creating the desired family group and offering a solution to the problem of unmarried mothers and their children.<sup>238</sup> This pro-traditional family, pro-natal ideology is very much evident in the documentary history of adoption. The 1959 book by a social welfare professor explained that because one of the major purposes of marriage in Western culture is bearing and raising children, childless couples seek to adopt to fulfill their "unmet maternal and paternal needs," and "[t]he process of adoption then tends to complete the cultural image of the most sanctified and revered of our social institutions—marriage and the family."<sup>239</sup> Or, as the Child Welfare League's *1958 Standards for Adoption Service* put it, "[a]doption as a means of creating families has had growing acceptance in our society. Great value is placed on children, and a family without children is considered incomplete."<sup>240</sup> The League noted that while the demand for white infants greatly exceeded the number available, "many unmarried mothers, as well as some married parents who find it necessary, are more ready than formerly to relinquish children for adoption."<sup>241</sup>

In a 1956 article on adoption practices in which the League's executive director Joseph H. Reid acknowledged that "[b]road cultural considerations have affected deeply the principles and convictions of [social service] agencies,"<sup>242</sup> Reid offered an extreme example of this social mood, in terms that may sound cruelly conformist to our turn-of-the-century ears: "A family in the United States is not considered complete or meaningful unless it has children. Childless couples have a multiplicity and diversity of pressures upon them to have children . . . . It can be fairly said that it is not socially acceptable not to have them."<sup>243</sup> As for the woman who gives birth outside of marriage, he continued:

An agency has a responsibility of pointing out to the unmarried mother the extreme difficulty, if not the impossibility, if she re-

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237. SOLINGER, *supra* note 236, at 154.

238. When one speaks of a pervasive ideology or social consensus, it is not to suggest, of course, that there were not contrary views or dissension in the society. See, e.g., *supra* note 229 and accompanying text; *infra* note 244.

239. ZIETZ, *supra* note 3, at 368-69.

240. 1958 STANDARDS, *supra* note 135, at 1.

241. *Id.*

242. Joseph H. Reid, *Principles, Values, and Assumptions Underlying Adoption Practice*, 1956 NAT'L CON. SOC. WORK 136.

243. *Id.*

mains unmarried, of raising her child successfully in our culture without damage to the child and to herself. . . . The concept that the unmarried mother and her child constitute a family is to me unsupportable. There is no family in any real sense of the word.<sup>244</sup>

The white unmarried mother was thus to some, with her "uncontained female sexuality, . . . a major threat to the middle-class family."<sup>245</sup> A new psychological view of the unmarried mother supported the idea that her child, when surrendered for adoption, should be completely and forever severed from the child's birth family. Although not without some vigorous critics,<sup>246</sup> this view of the unmarried white mother was that she was mentally ill, had become pregnant on purpose, and was in need of treatment to recover and later attain normal family life within marriage. Black unmarried mothers, in contrast, tended to be viewed either as part of a cultural context in which out-of-wedlock birth was "an accepted way of life rooted in the cultural and economic legacies of slavery,"<sup>247</sup> or as being biologically subject to "uncontrolled, sexual indulgence."<sup>248</sup> Unmarried black mothers were generally expected to keep their babies, as most black and white unmarried mothers had done in an earlier era.<sup>249</sup>

Popular psychoanalytic theories influenced developing ideas about white women's out-of-wedlock pregnancies in the 1940s and 1950s:<sup>250</sup> "[T]he unplanned pregnancy was understood to be a form of sexual acting out of unconscious needs and as such was seen as an expression of unresolved parent-child conflicts. Furthermore, it was assumed that the pregnancy represented significant psychopathology in the mother."<sup>251</sup> Exhaustively canvassing professional literature,

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244. *Id.* at 139. Of course, these views were not wholly embraced by all. In a U.S. Children's Bureau report of a meeting of a group of social workers held in the same year, the point was emphasized that the argument for early placement of infants "rested on the presumption that the mother has had an opportunity to receive help in weighing alternatives, understanding her feelings, and reaching a good decision." UR-SULA M. GALLAGHER, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SOCIAL WORKERS LOOK AT ADOPTION 9 (1958). Discomfort over pressure for adoption was described by historian Solinger: "Some service providers felt the mandate was too coercively and too universally applied to white unmarried mothers." SOLINGER, *supra* note 236, at 155. There were objections to concentrating resources on adoption and not developing services for unmarried mothers, and fears about unwed mothers without sufficient services being "vulnerable to black marketeers interested only in making money off of them." *Id.*

245. SOLINGER, *supra* note 236, at 101.

246. *See, e.g.,* ISAAC, *supra* note 188, at 46-51.

247. Anne B. Brodzinsky, *Surrendering an Infant for Adoption: The Birthmother Experience*, in *THE PSYCHOLOGY OF ADOPTION*, *supra* note 191, at 295, 298.

248. SOLINGER, *supra* note 236, at 24.

249. *See id.* at 151-52.

250. Brodzinsky, *supra* note 247, at 297.

251. *Id.*; *see also* CARP, *supra* note 5, at 114-16.

historian Rickie Solinger chronicled this development in her book on unmarried pregnancy and race. She detailed how this understanding was found attractive and useful by service providers.<sup>252</sup> The unmarried mother's baby could be seen as an object of the psychological problem,<sup>253</sup> and the mentally unhealthy mother as ill-equipped to be a satisfactory mother for the baby.<sup>254</sup> The unmarried mother, however, could be cured, and she should be rehabilitated, or redeemed, so that she might become marriageable once again. "Essentially, the cure for the white unmarried mother required three steps: remorse; relinquishment of the infant for adoption; and renewed commitment to fulfilling her destiny as a real woman."<sup>255</sup> As a report of a U.S. Children's Bureau conference rather starkly put it:

Besides a humanitarian interest in helping girls in trouble, another important reason exists for being concerned about their future. Most of them are in the early years of their child-bearing period. Most of them will have other children, hopefully in wedlock. The community has a real stake in helping these girls become stable wives and mothers.<sup>256</sup>

It is likely that it was both the understanding of adoption as a perfect and complete substitution for creating a family by childbirth, and the regime of secrecy created by nearly universal laws closing adoption records to birth parents, adoptive parents, and minor adoptees, that led to the association of negative social meanings with the acts of adult adoptees who sought information about birth families. These negative meanings are evidenced both by professionals' view of adoptees who sought information about their birth families and by the social constraints those adoptees reported feeling when they undertook searches. From professional quarters, one source of disapprobation was the psychoanalytically influenced view that searching adoptees were the psychologically disturbed products of unsuccessful adoptions. The influential psychiatrist Viola Bernard wrote in 1953 that a normal adolescent's "need for connection with his past" can be satisfied by his adoptive parents giving him non-identifying information or, if necessary, bringing him back to an

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252. See SOLINGER, *supra* note 236, at 86-186 *passim*.

253. See *id.* at 96 ("[T]he baby . . . was posited as simply an object of its mother's psychological disturbance.").

254. See *id.* at 98 (stating how an unwed mother was seen as not being in a position to be an adequate parent to the child); see also CARP, *supra* note 5, at 115-16.

255. SOLINGER, *supra* note 236, at 94. There were those who expressed more sympathy for the feelings of the surrendering unmarried mother. For example, the report of a 1957 federal government-sponsored meeting of a small group of social workers admonished social workers to "be aware of the pain and psychological implications inherent in separation and offer help and support through this troubled period." GALLAGHER, *supra* note 244, at 8.

256. PROTECTING CHILDREN, *supra* note 108, at 15.

agency that can provide more non-identifying details. However, "[o]ccasionally we see tragically pathological distortions . . . very disturbed young people who . . . develop an all-consuming, obsessing need to locate their biologic[al] parents who in fantasy, or even delusion, have become the idealized good parents in contrast to the adoptive 'bad' parents with whom they are usually no longer in contact."<sup>257</sup> The "antidote" to such pathology is a good relationship between the adoptee and his adoptive parents. "In emotionally healthy adoption . . . the child's involvement with his biological parents remains within bounds."<sup>258</sup> Although Bernard's view purported to be based on psychiatrist Florence Clothier's earlier work, it seems to go far beyond it. Dr. Clothier had simply speculated that the "family romance" of analytic literature may be more complex and difficult for the adopted child. The biological child can indulge in the fantasy that his parents are not his real parents "as in a game," secure in the love of his real parents, whereas the adopted child actually does have two sets of parents "and the correction of the foundling fantasy by reality is much less likely than in the own child."<sup>259</sup> Social workers apparently embraced the negative psychoanalytic view, however, as historian Carp documented through his research into the files of one agency. The agency's 1968 adoption manual characterized a searching adult adoptee as "a person who 'has had many unhappy past experiences and . . . is so intent upon finding the natural parent that he is not able to consider his request in a realistic or rational way.'"<sup>260</sup> Consequently, the manual advised caseworkers to discourage the search and then, if necessary, to refer the person for psychological treatment.<sup>261</sup>

Adoptees felt discouraged from seeking information "by the prevailing mood of society at large, by social workers, and by adoptive parents that such interest was unnatural or showed ingratitude."<sup>262</sup> Adoptees' experience of this disapproving social attitude inspired the defensively defiant name of a large adoptees' rights organization: Bastard Nation. It is a central theme in the autobiographical accounts by adoptees that are widely credited with spurring the move-

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257. Viola W. Bernard, *Application of Psychoanalytic Concepts to Adoption Agency Practice*, in READINGS IN ADOPTION 395, 430-31 (I. Evelyn Smith ed., 1963). For information about Bernard's influential role, see CARP, *supra* note 5, at 130-34.

258. *Id.* at 431.

259. Florence Clothier, *The Psychology of the Adopted Child*, 27 MENTAL HEALTH 231, 229-30 (1943); see Florence Clothier, *Some Aspects of the Problem of Adoption*, 9 AM. J. ORTHOPSYCHIATRY 598, 612-14 (1939).

260. CARP, *supra* note 5, at 120.

261. *Id.*

262. Joseph D. Harrington, *The Courts Contend with Sealed Adoption Records*, PUB. WELFARE, Spring 1980, at 29, 31.

ment for greater openness in adoption.<sup>263</sup> In her 1973 book *The Search for Anna Fisher*, a dramatic account of her more than twenty-year search for her birth parents, Florence Fisher related her frustration with the often unsympathetic and hostile receptions she received through the years from the doctor and lawyer who arranged her adoption, hospital administrators, court personnel, and others. The doctor asked her: "Aren't you grateful? [Your parents] took you in when no one else wanted you."<sup>264</sup> When she pleaded with a court clerk to see the file he was holding in his hand, he told her, "These records were sealed, and they'll stay sealed. You haven't got a chance in a million of ever getting to see these papers. You've got to get special permission from the judge, lady, and he'll never give it to you."<sup>265</sup> Fisher's Adoptees' Liberty Movement Association (ALMA), according to one adoptee and social worker member, liberated her from "the conviction . . . 'it was sick to be curious.'"<sup>266</sup> Another adoptee and social worker, who had found her birth family, catalogued negative views toward searching adoptees. She quoted an adoptive parent opposed to open records because "[g]iving a hunting license usually portends ill for the quarry," another who "declared that [searching adoptees] appear to lack impulse control, not unlike thieves," and a lawyer who testified that an adoptee might use information "to find and murder his biological parent."<sup>267</sup>

This disapproving social attitude is apparent in later judicial opinions as well. In one Missouri case, the court reported that an adoptee conceded she had not sought information from her adoptive parents "because they would be hurt," but "risking that hurt and the possibility of disturbing their relationship, she commenced a search."<sup>268</sup> In a companion case, a forty-eight-year-old adoptee argued that "assurance for anonymity should not be preserved at the expense of the adoptee, for it is unjust that a child should suffer for the

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263. See, e.g., KITTSOON, *supra* note 1; FISHER, *supra* note 215; LIFTON, *supra* note 216. Paton and Lifton also wrote about the experiences of other adoptees. See JEAN M. PATON, *THE ADOPTED BREAK SILENCE* (1954); BETTY JEAN LIFTON, *LOST AND FOUND: THE ADOPTION EXPERIENCE* (1979). Paton and Fisher formed support and advocacy organizations. See PAUL SACHDEV, *UNLOCKING THE ADOPTION FILES 1-2* (1989) (describing the roles of Paton and Fisher); WEGAR, *supra* note 34, at 74-75 (describing the role of autobiographical accounts in mobilization of the search movement).

264. FISHER, *supra* note 215, at 63.

265. *Id.* at 87.

266. Annette Baran et al., *Adoptive Parents and the Sealed Record Controversy*, SOC. CASEWORK 531, 532 (1974) (quoting Babette Dalsheimer, *Adoption Runs in My Family*, MS., Aug. 1973, at 82, 86).

267. Small, *supra* note 186, at 41; see also, e.g., ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTED, BIRTH PARENTS, AND ADOPTIVE PARENTS* 146-49 (1978) (giving first-person accounts of search experiences in which adoptees experienced strong disapproval).

268. *In re Maples*, 563 S.W.2d 760, 761 (Mo. 1978) (en banc).

transgressions of his parents."<sup>269</sup> The court discerned in his argument "a casual indifference toward rights of the natural parents and . . . a knowledge of improper conduct on their part, of which neither petitioner nor this court have information and quite properly should not."<sup>270</sup>

The negative social meanings associated with adult adoptees' interest in information about birth families in turn were likely both reflected in and further fostered by the emerging understanding that lifelong secrecy was an essential feature of adoption. That this understanding became firmly established over time is confirmed by the way in which recent history has faded from collective memory.<sup>271</sup> For example, the distinction between sealing court records to all persons and sealing birth records even to those whose births they register was lost. This loss of the distinction is evidenced by later statements in legal literature as well as later incidents in which state officials expressed confusion about or resisted statutory commands to provide adult adoptees with birth records. A law review article published in 1975, for example, criticized a "lack of consistency" in statutes that "results from the fact that the sealed records statutes are generally found in both the adoption statutes and in the separate public health and records statutes."<sup>272</sup> The author apparently included in this "inconsistency" those statutory schemes that sealed court records completely, while permitting adult adoptee access to original birth records.<sup>273</sup> Similarly, the author of a comment in 1978 recommended that "[s]uch inconsistency between confidentiality statutes under a state's domestic relations laws and statutes of disclosure under its vital statistics laws should be examined and corrected by state legislatures."<sup>274</sup>

In Pennsylvania, the Department of Health sought the attorney general's opinion about the vital statistics law that provided access to original birth records "upon request of the person involved if he has attained majority and is not incompetent, or upon request of his parent, guardian or legal representative."<sup>275</sup> In 1978, the Pennsylvania attorney general responded that this law was *not* negated by a provision of the Commonwealth's adoption law concerning court records, under which "[a]ll petitions, exhibits, reports, notes of testimony, de-

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269. *In re Gilbert*, 563 S.W.2d 768, 769 (Mo. 1978) (en banc).

270. *Id.*

271. *See infra* Part IV.B.

272. Michael L. Hanley, *A Reasonable Approach to the Adoptee's Sealed Records Dilemma*, 2 OHIO N.U. L. REV. 542, 545 (1975) (footnote omitted).

273. *See id.*

274. James R. Carter, Comment, *Confidentiality of Adoption Records: An Examination*, 52 TUL. L. REV. 817, 821 (1978) (footnote omitted).

275. 14 Op. Pa. Att'y Gen. 43 (1978).

crees, and other papers . . . shall be . . . withheld from inspection except on an order of court granted upon good cause shown."<sup>276</sup> The two laws "are not irreconcilable as a matter of law; nor have they been as a matter of practice."<sup>277</sup> When the Pennsylvania legislature acted six years later to eliminate adult adoptee access to birth records, it did not amend the vital statistics provision, but instead passed a law declaring that the vital statistics provision was "repealed insofar as [it is] inconsistent with" the law "relating to impounding of [court] proceedings and access to records."<sup>278</sup> Similarly in Oklahoma, an attorney general's opinion was sought to answer the question whether the law did, as it appeared to, "confer upon an adopted person of legal age an absolute right, upon demand of the State Registrar, to see his original birth certificate."<sup>279</sup> In New Hampshire, the attorney general's opinion was sought in the mid-1960s. State law sealed adoption court records but not original birth records. State practice was that inspection of such birth records was at the discretion of the state registrar or the town clerk. The attorney general, relying on the statutory provision sealing court records, advised that the registrar had the "authority and the duty" to direct town clerks not to cross reference original and amended certificates, making it impossible to furnish original records to adoptees who did not already know their original surnames.<sup>280</sup>

In Florida and Louisiana, adoptees went to court in the mid-1970s to force records custodians to comply with laws requiring, respectively, that the adoptee be "furnish[ed] the original birth certificate . . . 'at the instance and request of the person whose birth is the subject of the said certificate'"<sup>281</sup> and that the adoptee have access upon demand, by order of a court.<sup>282</sup> Although the Florida court enforced the state statute, it noted "there may be compelling reasons supporting the [state custodian's] position."<sup>283</sup> In Louisiana a year later, and in Florida four years later, legislatures eliminated adult adoptees' court confirmed right of access to the records.<sup>284</sup>

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276. *Id.*

277. *Id.*

278. 1984 Pa. Laws 195 (amending the Vital Statistics Laws of 1953).

279. 14 Op. Okla. Att'y Gen. 204 (1982); see *supra* notes 98-99 and accompanying text.

280. 1 Op. N.H. Att'y Gen. 186 (1966).

281. State Dep't of Health & Rehab. Servs., Health Program Office v. Mullarkey, 340 So. 2d 123, 124 (Fla. Dist. Ct. App. 1976).

282. *Chambers*, 349 So. 2d at 426.

283. *Mullarkey*, 340 So. 2d at 124.

284. 1980 Fla. Laws ch. 296; 1997 La. Acts 659.



*B. From the 1960s*

Ample evidence in the literature suggests that an adoptee's desire to know his biological roots is not idle curiosity of individuals who are psychologically and socially impaired . . . but is nearly a universal phenomenon in normal personality development.<sup>285</sup>

—Social work professor Paul Sachdev, 1989.

Our Reunion Registry Databank is a multi-level, computerized, cross-linking system, containing the vital statistics of adoptees, natural parents and all persons separated by adoption for possible matching. . . . For example, if a mother who gave up a son born May 20, 1930 in St. Luke's Hospital, New York and an adopted male with matching information both register with us, we put them in touch without delay.

. . . ALMA [Adoptee's Liberty Movement Association] has reunited more than 100,000 families separated by adoption, and we take pride in our accomplishments.<sup>286</sup>

—ALMA website, 2000.

The understanding that lifelong secrecy was an essential feature of adoption continued to gain currency even as a social revolution was occurring, a revolution that challenged both lifelong secrecy and the understanding of adoption as a perfect and complete substitute for creating a family by childbirth. Although some adoption agency practices<sup>287</sup> were affected and some legislative changes were made,<sup>288</sup> of the twenty states that in 1960 had laws allowing adult adoptees access to original birth records, all but three nevertheless went on to join those states that had earlier eliminated the right.<sup>289</sup> Only three states have since re-established an unqualified right of access to birth records:<sup>290</sup> Tennessee in 1995, Oregon in 1998, and Alabama in

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285. SACHDEV, *supra* note 263, at 14-15.

286. Adoptee's Liberty Movement Association, at <http://www.almanet.com> ("Registry Databank" and "Membership Information" pages). The organization's registry is one of many available on the World Wide Web. The largest registry is the International Soundex Reunion Registry, which is available free of charge to searching adoptees and birth relatives. ISRR, <http://www.isrr.com>. For lists of registries and other search resources, and links to lists of registries and other search resources, see <http://www.americanadoptioncongress.org> (American Adoption Congress website); <http://www.bastards.org/library.search.htm> (a page on the Bastard Nation website).

287. See, e.g., Elizabeth S. Cole & Kathryn D. Donley, *History, Values, and Placement Policy Issues in Adoption*, in *THE PSYCHOLOGY OF ADOPTION*, *supra* note 192, at 273, 280-94 (discussing issues that arise during each stage of the adoption process).

288. See *supra* note 12 and accompanying text (discussing the prevalence of states' passive and active mutual consent registries).

289. See *supra* notes 70-102 and accompanying text.

290. See *supra* note 23 and accompanying text.

2000. Two have established a qualified right<sup>291</sup> and seven others a qualified right of access only for adoptees in future adoptions.<sup>292</sup> The persistence of lifelong secrecy and the related negative view of adult adoptee interest in birth families demonstrate the difficulty Professor Lessig describes of changing social meanings because of a conscious or unconscious tendency of "defensive construction," that is, a tendency to preserve established but threatened meanings.<sup>293</sup>

The understanding that lifelong secrecy was an essential feature of adoption, and the negative social meanings that were a function of that understanding, were defensively constructed by the actions of the states that in more recent years eliminated adult adoptees' right of access to birth records. The states reinforced both the threatened understanding and meanings by making the act of seeking information unlawful. The understanding and meanings were defensively constructed in a more unconscious way by the emergence of a common, ahistorical idea about the development of secrecy in adoption—the idea that from the earliest enactments establishing secrecy among the parties, a central purpose was to create a guarantee of or a right to lifelong anonymity for the birth parents.<sup>294</sup> Commentators and courts reflecting on the earlier passage of laws prohibiting parties' general access to adoption records conveyed the impression not

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291. See *supra* note 24.

292. See *supra* note 25.

293. Lessig, *supra* note 204, at 1013; see *supra* notes 212-13 and accompanying text.

294. See *infra* notes 356-88 and accompanying text. Other justifications advanced today for prohibiting adult access to birth records are that: (1) the prohibition relieves adoptive parents' fears that their children might, when they are grown, transfer their affections to their birth parents; (2) in the absence of the prohibition, birth parents either will be discouraged from placing a child they would otherwise place for adoption, or will be encouraged to abort; and (3) potential adoptive parents will be discouraged from adopting. See Cole & Donley, *supra* note 287, at 292-93. It has also been argued that open records would lead to "a very sharp drop in the number and quality of adoptive" parent applicants because they "are quick to recognize that opening the sealed record changes their status from 'real' parents to that of long-term foster parents. The perennial and endemic fear of adoptive parents, namely, that they will lose their child to biological parents, will be enhanced and transformed into reality." Richard Zeilinger, *The Need Vs. the Right to Know*, 37 PUB. WELFARE, Summer 1979, at 44, 46. Opponents of the prohibition argue that in countries such as Great Britain and Israel and in the states that permit adult access, the "dire consequences predicted as a result of giving information have not occurred." Cole & Donley, *supra* note 287, at 293. As reported by a lawyer for the birth parents, adoptive parents, and adoptees involved in the litigation over the Tennessee open records law, statistics in Kansas and Alaska, where adoptees have long had access to birth records, show that adoption rates "have been higher than those in the United States as a whole . . . and abortion rates . . . were lower than in the United States as a whole." Greenman, *supra* note 24, at 4; see also Jodi Nirode, *Law Professor Pushes for Greater Access to Adoption Records*, COLUMBUS DISPATCH, May 4, 2000, at 7C (discussing Joan Hollinger's speech and adoption symposium at which it was delivered).

only that these laws had provided some measure of anonymity for birth parents but also that assuring lifelong anonymity had been one of their primary goals.<sup>295</sup> The later closings of birth records to adult adoptees, and all of the states' enactments of passive and active registry systems, reflected and fostered this more recent idea about lifelong secrecy in adoption. The social meanings associated with adoptee interest in birth families remained negative, no longer because of adoptees' pathology but instead because such interest was tied to and seen as an invasion of birth parents' interests.

The social revolution that challenged and threatened to undermine lifelong secrecy has included a lessening of the stigma of illegitimacy and a greater acceptance of single-parent and other non-traditional types of families.<sup>296</sup> With respect to attitudes about adoption, white unmarried motherhood is no longer equated with mental disorder or an ability to recover easily from surrendering a child for adoption.<sup>297</sup> A large majority of birth parents are reported to be open to or actually desire contact with adoptees.<sup>298</sup> Adoptive families have come increasingly to be seen as having unique qualities and challenges.<sup>299</sup> Thinking on human development has shifted back toward a greater emphasis on nature.<sup>300</sup> Adoptees searching for information about or contact with their birth families have become familiar figures<sup>301</sup> and are no longer assumed to be suffering from a mental disorder.<sup>302</sup> Whether adoptees' expressed desires for identifying information is in any sense innate or instinctive, as some have argued,<sup>303</sup> or is purely culturally constructed,<sup>304</sup> substantial and increasing numbers of adult adoptees since the 1960s have sought information about

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295. See *infra* notes 360-88 and accompanying text.

296. See *infra* notes 315-16 and accompanying text.

297. See Brodzinsky, *supra* note 247, at 300-04; *infra* notes 317-20 and accompanying text.

298. See *infra* notes 321-28 and accompanying text.

299. See *infra* notes 329-31 and accompanying text.

300. See *infra* notes 332-34 and accompanying text.

301. See *infra* notes 335-39 and accompanying text.

302. See *infra* notes 340-50 and accompanying text.

303. For example, psychiatrist Marshall D. Schechter and social worker Doris Bertocci have argued on the basis of their own and others' research that

[w]ith the psychological need to separate pushed by the biological changes of adolescence, the dissonances and differences for the adoptee are highlighted and eventually create, in our view, a *driven need to experience human connectedness*. This craving grows with time, experienced subjectively by some adoptees as equivalent to starvation. . . . The need to search has to do with a craving, much of it having innate sources . . . .

Schechter & Bertocci, *supra* note 191, at 85; see also DAVID M. BRODZINSKY ET AL., *BEING ADOPTED: THE LIFELONG SEARCH FOR SELF* (1993).

304. See *infra* note 314.

their birth parents.<sup>305</sup> A nationwide advocacy movement seeking greater openness in adoption, including adult adoptee access to birth records, has grown steadily from its beginnings in the late 1960s and has involved both litigation and legislative advocacy.<sup>306</sup> In the courts, individuals have sought to establish good cause for opening records,<sup>307</sup> and both individuals and groups have argued, without success to date, that closed records violate their constitutional rights.<sup>308</sup> Mutual aid networks of searching adoptees and birth relatives have also proliferated, expanding in recent years through the Internet.<sup>309</sup>

Stories about searching and reuniting adoptees and birth relatives are frequently featured in books, newspapers, magazines, television programs, and movies.<sup>310</sup> The movement for greater openness, publicized and popularized in these ways, may be seen in effect, if not necessarily in intent, as a means of changing the social understanding about lifelong secrecy by promoting changes in affiliated social meanings.<sup>311</sup> The evolution of social meaning is being affected by tying the act of seeking information to many sympathetic stories of individuals' searches and reunions,<sup>312</sup> as well as to the broader and

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305. As early as 1976, a Child Welfare League official wrote about the "growing number" of adult adoptees "challenging the long-held practices for agency- and court-sealed adoption records." Rebecca Smith, Editorial, *The Sealed Adoption Record Controversy and Social Agency Response*, 55 CHILD WELFARE 73, 73 (1976). For a later report of growing interest, see, e.g., SACHDEV, *supra* note 263, at 2-3. There are no definitive statistics on the number or percentages of adolescent or adult adoptees who have actively searched or contemplated searching, or who might search in a different social and legal climate. Estimates of the percentage of adoptees who have searched or have wished to search range from fifteen to thirty-five. See Schechter & Bertocci, *supra* note 191, at 67-68. A 1994 research report supported by the National Institute of Mental Health found in its study of 715 adoptive families and their 881 adopted adolescents that "57% of the boys and 70% of the girls said they would like to meet their birth parents some day," although "only 10% said they thought about them often or would consider searching for them." 2 HOLLINGER ET AL., *supra* note 4, § 13.01[1]. The methodology of the study has been criticized on a number of grounds, including a very high rate of non-response from adoptive families asked to participate in the study. See *id.*; March Wineman Axness, *Growing Up Adopted: An Inquiry into Limitations, Interpretations, and Implications of the Search Institute's 1994 Adoptive Family Study*, 16 DECREE (Am. Adoption Cong., Washington, D.C.), No. 4, at 1 (1996).

306. For accounts at various times of this movement, see C. Wilson Anderson, *The Sealed Record in Adoption Controversy*, 51 SOC. SERVICE REV. 141 (1977); Watson, *supra* note 230, at 13-14; Harrington, *supra* note 262; Thompson, *supra* note 227, at 13; Watson, *supra* note 230, at 13-14.

307. See *infra* notes 380-400 and accompanying text.

308. For a recent review and analysis of constitutional arguments in support of open records, see Cahn & Singer, *supra* note 34.

309. See *supra* notes 12, 280.

310. See *infra* notes 329-33 and accompanying text.

311. See *supra* notes 200-07 and accompanying text.

312. See Lessig, *supra* note 205, at 996-98.

long-standing societal emphasis on genealogy.<sup>313</sup> Positive stories about adoptees and birth relatives searching for one another, as well as the formation of large numbers of mutual support and advocacy groups, are serving to lessen the social stigma and thus reduce the social cost<sup>314</sup> individuals experience when they undertake searches.

Among the most dramatic aspects of the larger social revolution are those associated with attitudes toward illegitimacy and single-parent families. The "steady decline" of "restrictive and moralistic social attitudes about unplanned pregnancy" has been attributed to factors such as the "sexual revolution" of the 1960s, greater reproductive freedom, and the women's movement, as well as to an "increasing social regard for women," financial benefits for single mothers, and an increase in the divorce rate that has made single-parent families more common.<sup>315</sup> A social work professor discussing adoption practices in 1966 evoked these changes when she asked: "Is it possible that . . . social workers have been insensitive to an evolving mood, less condemnatory to the unmarried mother family? . . . Is it possible, in short, that social workers have been operating on the basis of a presumed rather than a demonstrated need?"<sup>316</sup>

According to professional literature concerning birth mothers, as well as popular accounts both by and about them, many birth mothers who surrender children for adoption suffer long-term psychological consequences and many desire information about or contact with their surrendered children. Studies and anecdotal evidence also suggest that high percentages of all birth parents are receptive to being contacted by adult adoptees. With respect to the emotional lives of birth mothers, a 1990 survey of psychological studies reported that the studies' anecdotal data were "consistent with previous profes-

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313. As sociologist Katarina Wegar observed about the widespread publicity for adoption themes, particularly the theme of searching for birth parents, "[t]his publicity is essential to the search movement: not only does it evoke sympathy and support, but it promotes curiosity among adoptees about their biological origins." WEGAR, *supra* note 34, at 72.

314. Wegar concluded that adoptees' "need to know [is] as much social as it is innate," and must be expected in our culture.

Considering the weight attributed to the biological underpinnings of parent-child relationships in this society, it is both cruel and unreasonable to expect adoptees and their biological parents to feel otherwise.

Although arguments concerning the biological origins of the need to know remain speculative, we can be sure that in this society knowledge about genetic heritage is generally regarded and experienced as an important part of a person's identity, perhaps even as an archetypal yearning.

WEGAR, *supra* note 34, at 136-37.

315. Brodzinsky, *supra* note 247, at 298; *see also* NANCY E. DOWD, IN DEFENSE OF SINGLE PARENT FAMILIES 103-16 (1977).

316. Madison, *supra* note 181, at 342. She even suggested that "[p]erhaps . . . one-parent families could offer new hope for hard-to-place children." *Id.* at 347.

sional documentation of profound and protracted grief reactions, depression, and an enduring preoccupation with and worry about the welfare of the child . . . . These findings strongly suggest[ed] that, for many women, the experience of surrendering an infant for adoption is a nearly intolerable loss."<sup>317</sup> Women who adoption agency personnel had assumed could "put the experience behind them"<sup>318</sup> later began "to emerge from long years of silence to express sorrow, anger, and regret."<sup>319</sup> They explained "their previous reluctance to come forward as the outcome of both spoken and unspoken prohibitions coming from adoption caseworkers, family members, mental health workers, the religious community, and society in general."<sup>320</sup>

A number of small studies in the 1970s suggested that a substantial majority of birth parents who had been located by their surrendered children were accepting of being found. The studies also showed that a substantial majority of uncontacted birth parents would be willing to meet their children.<sup>321</sup> These studies were cited to and reported by authors of legal periodical articles favoring greater openness in adoption.<sup>322</sup> A sizeable study published in 1989 found evidence "shattering the prevailing myth that birth mothers are unconcerned about the child they relinquished. . . . [B]y and large birth mothers feel a continuing sense of loss and would like to reunite with their child . . . ."<sup>323</sup> Almost ninety percent of the birth mothers studied favored being contacted on behalf of their surrendered children.<sup>324</sup> Recently, statistics compiled by intermediary programs have indi-

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317. Brodzinsky, *supra* note 247, at 304; see also, e.g., Loverett Millen & Samuel Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55 AMER. J. ORTHOPSYCHIATRY 411 (1985). For autobiographical accounts, see, e.g., MERRY BLOCH JONES, *BIRTHMOTHERS* (1993); CAROL SCHAEFER, *THE OTHER MOTHER: A WOMAN'S LOVE FOR THE CHILD SHE GAVE UP FOR ADOPTION* (1991).

318. Brodzinsky, *supra* note 247, at 295.

319. *Id.* at 298-99.

320. *Id.*

321. See LAURIE WISHARD & WILLIAM R. WISHARD, *ADOPTION: THE GRAFTED TREE* 166 (1979) (referring to a 1976 study stating that eighty-two percent of birth parents would be willing to meet with adult adoptees); Arthur D. Sorosky et al., *The Effects of the Sealed Record in Adoption*, 133 AM. J. PSYCHIATRY 900, 901 (1976) (stating that in a survey of fifty adult adoptees, eighty-two percent of birth parents were "positive and accepting," and only ten percent reacted "adversely" to the reunion with their surrendered children); Thompson, *supra* note 227, at 14 ("[C]ontrary to commonly expressed fears, most birth families were reasonably accepting of being found.").

322. See, e.g., Hanley, *supra* note 272, at 547-48; Elton B. Klibanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law*, 11 FAM. L.Q. 185, 195 (1977) (stating that in searches initiated by birth parents, "studies indicate that most biological mothers say they would be willing to participate in a future meeting with the child if it would be helpful to the child's welfare").

323. SACHDEV, *supra* note 263, at 178.

324. *Id.*

cated that as many as ninety-five percent of birth parents are open to contact.<sup>325</sup> In Hawaii, an intermediary in the state's active registry system reported in 1992 that when she contacts birth parents, "the most typical reaction . . . is great joy, crying, and 'This is the call I've been waiting for.'"<sup>326</sup> These themes of the continuing concern experienced by many birth parents, and their desire for or acceptance of contact with their adult children, are prominent in popular accounts of birth mothers' experiences such as Carol Shaefer's autobiographical work, *The Other Mother*,<sup>327</sup> which was made into a television movie, and the study, *BirthBond*, which documented birth mothers' reunions with their children.<sup>328</sup>

The formation of families through adoption is no longer seen in the professional literature as a perfect and complete substitute for creating families through childbirth. "The traditional view held that adoption emulated the genetic birth experience. The adopted child was indistinguishable from children born to a family . . . . The emerging view[] holds that adoption is a unique, life long experience, not to be confused with genetic experience."<sup>329</sup> Adopted children have to cope with "the reality that they have two families," and "[a]doptive parents are encouraged to join their children in dealing with this fact and to use the process to increase their attachment to the children they have adopted."<sup>330</sup> Commenting as early as 1974 on a trend toward greater openness, a *Child Welfare* editorial opined that "[t]he

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325. In litigation over the Tennessee open records law, birth parents, adoptive parents, and adoptees who defended the law used statistics compiled by confidential intermediary programs to offer evidence that ninety-five percent of birth parents wanted to be contacted by their children. See Greenman, *supra* note 24, at 3 (stating that the figures were also confirmed by Connecticut Law Revision Commission data); see also G. William Troxler, *Human Rights & Responsibilities in Adoption*, available at <http://www.americanadoptioncongress.org/regional.html> (last visited Feb. 1, 2001). Troxler stated that New Jersey officials reported 94.9% of 350 living birth family members contacted in a four-year period wanted contact if adoptees requested it. *Id.* In 4097 contacts with birth mothers between 1981 and 1996, 7.5% refused contact with adoptees. *Id.* The South Dakota state official who assisted adoptees seeking identifying information reported in an interview that no problems have arisen there after adoptees received information. She said adoptees have been cautious and considerate in their use of the information and in their approaches to birth relatives. See Telephone Interview with Kleinsasser, *supra* note 71.

326. Lum, *supra* note 57, at 519. The searcher estimated that "less than five percent of birthparents immediately relay (over the telephone) a desire to remain confidential. Moreover, in the majority of the cases, after the initial shock wears off, the birthparent changes his or her mind." *Id.*

327. SCHAEFER, *supra* note 317.

328. JUDITH S. GEDIMAN & LINDA P. BROWN, *BIRTHBOND: REUNIONS BETWEEN BIRTHPARENTS AND ADOPTEES—WHAT HAPPENS AFTER . . .* (1989) (providing first-hand accounts of the experiences shared by birthmothers).

329. Cole & Donley, *supra* note 287, at 280.

330. *Id.*

creation of families based on psychological, not blood, ties contains inherent identity problems that practice and law seek to mitigate but can never eliminate.<sup>331</sup> The human development pendulum also changed direction, swinging somewhat further away from nurture and closer to nature.<sup>332</sup> Whereas studies of adoptee adjustment in the late 1940s through the early 1960s concentrated on "environmental factors . . . almost to the exclusion of genetic factors," since the mid-1960s "interest [has] swung toward elucidation of genetic factors in adoptee psychopathology (and by extension to adoptee adjustment)."<sup>333</sup> A psychiatrist reviewing this more recent professional literature concluded, "[t]he older view that children are a 'tabula rasa' as far as behavior, socialization, and the like are concerned would appear to be invalid."<sup>334</sup>

The image of adoptees searching for information about or contact with their birth families has become a more familiar one and is no longer assumed to indicate mental disorder or even dissatisfaction with the adoption experience.<sup>335</sup> In the 1960s and 1970s, autobiographical and journalistic accounts "developed momentum in the popular literature."<sup>336</sup> A plethora of autobiographical books and articles have chronicled searches for and reunions with biological relatives, from Jean Paton's, Florence Fisher's, and Betty Jean Lifton's groundbreaking books in the 1950s and 1960s,<sup>337</sup> to recent accounts such as one by writer and former NFL star Tim Green.<sup>338</sup> As sociologist Katarina Wegar notes, "[t]he adoption theme, particularly the theme of searching for birth parents, has emerged as a compelling human-interest story and has inspired myriad novels, plays, and movies."<sup>339</sup>

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331. Carl Schoenberg, *On Adoption and Identity*, 53 CHILD WELFARE 549 (1974).

332. See, e.g., Helen Cominos, *Minimizing the Risks of Adoption Through Knowledge*, 16 SOC. WORK 73, 79 (1971) (arguing that adoptive parents have a right to information about adoptees' heredity in order to minimize the risks they are expected to take).

333. Remi J. Cadoret, *Biologic Perspectives of Adoptee Adjustment*, in THE PSYCHOLOGY OF ADOPTION, *supra* note 191, at 25, 28-29.

334. *Id.* at 39. The author continued: "Not that environment is unimportant. It demonstrably is important and hopefully, with the aid of studies of adoptees, the role of environment (as well as genetics) in human behavior will continue to be clarified further." *Id.* at 39-40.

335. See, e.g., Schechter & Bertocci, *supra* note 191, at 62-90.

336. *Id.* at 66.

337. See *supra* note 263.

338. TIM GREEN, *A MAN AND HIS MOTHER: AN ADOPTED SON'S SEARCH* (1997).

339. WEGAR, *supra* note 34, at 72. As early as 1979, it was noted that "[i]n the past few years there has been an increasing number of newspaper and magazine articles dealing with the adoptee's wish to know about and possibly to find his family of birth. T.V. and films, sensing the emotional pull of the topic, have used the theme frequently." Thompson, *supra* note 228, at 13.



In the 1970s, authoritative voices began characterizing adoptees' interest in their birth families as both normal and perhaps even important to satisfy. An academic observer in 1977 reported that "[w]hile the effort to gain access to the sealed record in adoption has been initiated and sustained by adoptees themselves, support for their efforts has emerged from both social work and the law."<sup>340</sup> A committee of the American Academy of Pediatrics reported in 1971 "evidence that the adopted child retains the need for seeking his ancestry for a long time."<sup>341</sup> Influential articles were published in the 1970s by a team of researchers—two social workers and a psychiatrist: Annette Baran, Reuben Pannor, and Arthur D. Sorosky. They advocate open records in their work, arguing that adoptees are especially vulnerable to identity conflicts, that closed records lead to psychological problems, and that successful searches benefit most of the adoptees who conduct them as well as their birth parents.<sup>342</sup> Similarly, a mid-1970s Canadian study stated that "an adoptee's need to know about his or her birth family was a normal and natural piece of the adoption phenomenon and was not restricted to those adoptees who [have] had unhappy adoption experiences."<sup>343</sup> Editorials in the Child Welfare League of America's publication counseled that the sealed records controversy must be viewed with an open mind that considers "the possibility that adult adoptees may be right in demanding elimination of secrecy."<sup>344</sup> Further, in light of the existence, *inter alia*, of inherent identity problems and the discontent of some adult adoptees, a day might come when almost all adoptions would be open from the outset.<sup>345</sup> Also in the mid-1970s, a study of adopted persons in Scotland,<sup>346</sup> where birth records had been open since 1930,<sup>347</sup> influenced the passage in 1975<sup>348</sup> of a law that opened records

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340. Anderson, *supra* note 306, at 143.

341. Prager & Rothstein, *supra* note 101, at 140 n.18 (citing Comm. on Adoptions, Am. Academy of Pediatrics, *Identity Development in Adopted Children*, 47 PEDIATRICS 948 (1971)).

342. See, e.g., SOROSKY ET AL., *supra* note 267; Baran et al., *supra* note 266; Baran et al., *Open Adoption*, SOC. WORK 97 (1976); Sorosky et al., *supra* note 321. For a discussion of their work and influence, see CARP, *supra* note 5, at 148.

343. Thompson, *supra* note 227, at 14.

344. Smith, *supra* note 305, at 74.

345. See Schoenberg, *supra* note 331, at 549.

346. TRISELIOTIS, *supra* note 188.

347. See *id.* at 1.

348. See Carolyn Burke, Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 SO. CAL. L. REV. 1196, 1203-04 (1975) (stating that because of a study done in Scotland, a legislative committee drafted recommendations to revise laws in England and Wales to allow adoptees to receive "a copy of [their] original birth certificate" at age eighteen).

in England and Wales as well.<sup>349</sup> Today, social service and other social science literature continues not to speak in terms of pathology. A review of more recent studies of searching adoptees showed instead merely disagreement about whether "the need to search is found predominantly among adoptees with unsatisfactory adoptive experiences," and "agreement that when a search is completed it usually results in significantly improved psychological changes within the adoptee."<sup>350</sup>

In "the growing number of articles favorable to the adoptee's quest" that began to appear in law periodicals in the 1970s,<sup>351</sup> legal commentators noted adoptees' growing interest in and advocacy for obtaining identifying information, as well as the increasing media attention paid to the issue.<sup>352</sup> The authors premised their analyses on the notions that the interest of many adoptees in identifying information is natural and that the inability to satisfy that interest can lead to psychological difficulties. As one wrote, "There is growing recognition that adoptees feel a greater lack of biological continuity than has been previously accepted, and that these feelings cannot be discounted as occurring only in maladjusted or emotionally disturbed individuals."<sup>353</sup> With respect to the effect of sealed records on adult adoptees, a Maryland judge explained that the "wellspring of the attack on sealed record statutes lies in the growing recognition of psychological impairment occasioned by the denial of access to information regarding birth origin."<sup>354</sup> A Midwestern practitioner described

349. Children Act, 1975, c. 72 (Eng.) (allowing adoptees at age eighteen to obtain birth records).

350. Schechter & Bertocci, *supra* note 191, at 71 (emphasis added).

351. Anderson, *supra* note 306, at 143.

352. See, e.g., James J. Bianco Jr. et al., *The New Hampshire Adoption Statute: An Overview*, 18 NEW HAMPSHIRE B.J. 199, 225-26, 229 (1977) (discussing the increasing interest of adoptees in the search movement); Klibanoff, *supra* note 322, at 186 (commenting on the media attention and the movement for and against open records); Burke, *supra* note 348, at 1196-97 (identifying an increase in searching, advocacy, and publicity); Carter, *supra* note 274, at 837 (noting an increase in adoptees seeking access to records); Ruth Clement Scheppers, Comment, *Discovery Rights of the Adoptee—Privacy Rights of the Natural Parent: A Constitutional Dilemma*, 4 SAN FERN. V. L. REV. 65 (1975) (discussing the movement for open records).

353. Scheppers, *supra* note 352, at 68; see also, e.g., Burke, *supra* note 348, at 1196 (stating the compelling psychological need of many to learn natural heritage); Lupack, *supra* note 66, at 219, 228 (discussing the deep-seated need of many to learn identity).

354. Marshall A. Levin, *The Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity*, 8 U. BALT. L. REV. 496, 498-99 (1979); see also, e.g., Hanley, *supra* note 272, at 546 (noting the possibility of an identity crisis due to lack of knowledge); Lupack, *supra* note 66, at 218-19 (acknowledging that a lack of knowledge can impede identity development); Prager & Rothstein, *supra* note 101, at 139 (discussing the serious psychological problems).

some adoptees' "years of agonizing searching and depression."<sup>355</sup>

Despite these changing popular and professional views of adoptees' seeking information, the social understanding of lifelong secrecy as an essential feature of adoption persisted and states continued to close birth records to adult adoptees. Observing the phenomenon of a state closing birth records in this period, one article in 1977 puzzled, "it is surprising Connecticut would change its law in light of the current mode of openness with respect to adoptive records. . . . Connecticut has reported . . . very few problems with prospective adoptive parents because of the openness of the statute."<sup>356</sup> An earlier article reported that "no problems resulted to either the adopted person or his natural parents following the disclosure of the latter's identity."<sup>357</sup> But the threatened understanding about lifelong secrecy was being shored up by a contemporarily plausible rationale. In what can be seen as reflecting a "defensive construction"<sup>358</sup> of a social understanding and its affiliated social meanings, judicial opinions and legal commentaries conveyed the impression that, as a rule, the prohibitions on parties' access to records and adult adoptees' access to birth records occurred simultaneously. They indicated that these measures were undertaken to guarantee birth parents' lifelong anonymity, as well as for other reasons such as the need to protect the adoptive family from potential interference by birth parents. Therefore, adoptee interest in birth families seriously impinged on birth parents' interests. Lifelong secrecy had become so entrenched in the 1970s that the rhetoric and reasoning of most judicial opinions and legal periodical articles made it seem as if there had never been a time when a chorus of expert voices recommended sealing records but allowing adult adoptees access to original birth records. These opinions and commentaries made it seem as if there had never been long periods in many states, only recently concluded in some and ongoing in others, when the recommendation for allowing adult adoptees access had been followed without apparent harm either to individuals or to the institution of adoption.<sup>359</sup>

The legal commentaries typically discussed the closing of adoption records as a unitary event, without acknowledging distinctions among agency, court, and birth records. One article explained that "the practice of closing the records was initiated, and procedures

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355. C.L. Gaylord, *The Adoptive Child's Right to Know*, CASE & COMMENT, Mar.-Apr. 1976, at 38, 44 (asserting adopted children should have a legal right to inquire into their origin).

356. Bianco et al., *supra* note 352, at 231.

357. Prager & Rothstein, *supra* note 101, at 150 (citing a letter from a state adoption official).

358. Lessig, *supra* note 204; see *supra* notes 212-13 and accompanying text.

359. See *infra* notes 360-400 and accompanying text.

were started to protect the privacy and permanency of the adoption process. Records . . . became available to adopted persons to see only if reasonable cause could be shown."<sup>360</sup> One comment noted that "a major purpose of the confidentiality statutes [was] to keep the identity of the biological parents secret."<sup>361</sup> An influential 1977 article in the *Family Law Quarterly* referred to "decades of policy protecting the anonymity of the biological parents."<sup>362</sup> Authors based the analyses in their articles on the existence of a general "right to anonymity,"<sup>363</sup> "guarantee of anonymity,"<sup>364</sup> and "right to remain anonymous."<sup>365</sup> Authors stated without citation or further explanation that many mothers "relinquished their children with a clear assurance of anonymity."<sup>366</sup> Nevertheless, some of the authors concluded that a right of access for adult adoptees, based on either a constitutional right or a statutory right, should trump desires for, expectations of, or rights to anonymity on the part of birth parents and a corresponding state interest in sparing birth parents from distressing or disruptive reunions.<sup>367</sup> Some authors recommended systems in which intermediaries would obtain information and make contacts.<sup>368</sup>

In the reported opinions concerning secrecy in adoption that began appearing in the 1970s,<sup>369</sup> the courts also wrote in terms of birth parents' "right to privacy"<sup>370</sup> and "statutory guarantee of anonymity and confidentiality."<sup>371</sup> Opinions discussed the development of secrecy among the parties as a single legal event intended to promote the interests of all the members of the adoption triangle—adoptees, adoptive parents, and birth parents—and the derivative interests of the

360. Bianco et al., *supra* note 352.

361. Carter, *supra* note 274, at 845.

362. Klibanoff, *supra* note 322, at 196 (emphasis added).

363. Prager & Rothstein, *supra* note 101, at 148.

364. Klibanoff, *supra* note 322, at 195.

365. Bianco et al., *supra* note 352, at 233-34.

366. Scheppers, *supra* note 352, at 76.

367. See, e.g., Gaylord, *supra* note 355, at 44; Burke, *supra* note 348, at 1197; Luppach, *supra* note 66, at 217; Jackie L. Payne Sr., Note, *Adoptees: Have We Forgotten that They Are Human Also?*, 4 S.U. L. REV. 104, 113 (1977) (advocating open records laws); Prager & Rothstein, *supra* note 101, at 144-49 (stating that there may be a constitutional right to know).

368. See, e.g., Hanley, *supra* note 272, at 553; Klibanoff, *supra* note 322, at 197-98; Carter, *supra* note 274, at 852-53.

369. See generally Kristine Cordier Karnezis, Annotation, *Restricting Access to Judicial Records of Concluded Adoption Proceedings*, 83 A.L.R.3d 800 (1978).

370. Mills v. Atlantic City Dept of Vital Statistics, 372 A.2d 646, 651 (N.J. Super. Ct. Ch. Div. 1977) (holding statute that placed birth certificates under seal did not violate adoptees' rights to privacy, to receive important information, or to equal protection).

371. *In re Sage*, 586 P.2d 1201, 1203, 1205 (Wash. Ct. App. 1978) (denying adult adoptees' motion to inspect adoption records).

society in an effective and lawful adoption system. As a Rhode Island court typically outlined, in a case in which a birth mother sought information about her eleven-year-old child, lifelong secrecy gives the birth parent "assurance that his or her identity will not become public knowledge" and "an opportunity to restructure his or her life after a most traumatic episode."<sup>372</sup> It allows adoptive parents to raise the child "free from interference from the natural parents and without any apprehension that the birth status of their child will be used to harm themselves or the child."<sup>373</sup> It "protects the adoptee from any possible stain of illegitimacy and permits the formation of a relationship with the new parents . . . free of the threat of outside interference" of a birth parent.<sup>374</sup>

Rejecting adoptees' constitutional challenges to sealed records, some courts suggested, to the contrary, that the states' important interest in protecting the privacy of birth parents might itself be "compelling" in constitutional terms.<sup>375</sup> Even in a state in which birth records had been available to adult adoptees until two years earlier, the Louisiana Supreme Court stressed in 1979 that the court, rather than the adoptee, should undertake inquiries concerning whether he had a right to inherit from "blood relatives" because, among other reasons, it could be that the birth parents were "assured of permanent anonymity" and "that either or both may have a right to personal privacy which includes a right to remain anonymous."<sup>376</sup> Courts also articulated related societal concerns that granting access to identifying information to adult adoptees could somehow reduce the availability of adoptive families or drive birth parents either to keep their children or resort to abandonment or black market transactions, in situations in which the best interest of the children would be served by lawful adoption proceedings.<sup>377</sup> A dissenter in the Louisiana case, however, did observe that "for several decades an adoptive child has had the right to learn his parentage (before the recent 1977 amendments to the statute), without noticeable effect on inhibiting adoptions."<sup>378</sup> "[I]t might be argued," the justice added, "that the social values involved in protecting the anonymity of the blood parents

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372. *In re Christine*, 397 A.2d 511, 513 (R.I. 1979); see also *Sage*, 586 P.2d at 1203-04; *Bradey v. Children's Bureau*, 274 S.E.2d 418, 421 (S.C. 1981) (denying adult adoptees' motion to unseal records for failure to show good cause).

373. *In re Christine*, 397 A.2d at 513.

374. See *id.*

375. *ALMA Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1236 (2d Cir. 1979) (holding that sealed records law was not unconstitutional).

376. *Massey v. Parker*, 369 So. 2d 1310, 1314 (La. 1979).

377. See, e.g., *In re Maples*, 563 S.W.2d 760, 763 (Mo. 1978); *Bradey*, 274 S.E.2d at 421.

378. *Massey*, 369 So. 2d at 1316 n.2 (Tate, J., dissenting).

are adequately served by preserving their identity for the first twenty years of their child's life."<sup>379</sup>

Whether deciding adoptees' petitions to open records for good cause or adoptees' claims of constitutional rights, the courts spoke in terms of weighing the interests of adoptees against a privacy interest of birth relatives,<sup>380</sup> although no statutes required notice to or a hearing for birth relatives before opening records. The weighing process is, of course, a peculiar one in which the courts compare the interests of persons before the court with interests of unknown, unrepresented persons who, as some opinions recognized, might not object to the release of information or might even joyfully welcome a reunion.<sup>381</sup> Perhaps one of the only state statutes that suggested the possibility of locating and consulting birth parents was New York's provision that court records could be opened "for good cause shown after due notice has been given to 'the adoptive parents and to such additional persons as the court may direct.'"<sup>382</sup> The New York Court of Appeals held that birth parents should be sought by the court only if a petitioning adoptee has first shown good cause for opening the records and if "the natural parents can be located with reasonable effort and in a manner that will not be likely to be self-defeating by revealing their identities to the adoptive parents or others."<sup>383</sup> If these conditions were satisfied, then notice to the birth parents would provide them "an opportunity to intervene through a representative . . . and defend their interest in retaining anonymity."<sup>384</sup> Courts in Louisiana, Missouri, and Rhode Island also approved the use of intermediaries to

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379. *Id.*

380. See *In re Linda F.M.*, 401 N.Y.S.2d 960, 962 (Sur. Ct. 1978) (holding that suit to unseal records may proceed even without notice to birth parents if birth parents are not easily accessible and noting in dicta that the presence of the Attorney General provides an adequate adversarial atmosphere); *Mellon*, 601 F.2d at 1236; *Massey*, 369 So.2d at 1314-15; *In re Maples*, 563 S.W.2d at 763; *Bradey*, 274 S.E.2d at 421; *Mills*, 372 A.2d at 651; *In re Sage*, 586 P.2d at 1204.

381. See, e.g., *Mellon*, 601 F.2d at 1236; *In re Linda F.M.*, 401 N.Y.S.2d at 962; *In re Assalone*, 512 A.2d 1383, 1389 (R.I. 1986) (holding that adoptee's curiosity about natural parents was not good cause for opening sealed records).

382. *In re Anonymous*, 399 N.Y.S.2d 857, 858 (Sur. Ct. 1977) (quoting N.Y. DOM. REL. LAW § 114(2) (McKinney 1999) (holding that good cause was shown when information was necessary to adult adoptee's mental rehabilitation); see also *supra* note 85 (citing 1974 Connecticut statute, which provided for showing good cause "ex parte or with such notice the court deems advisable").

383. *In re Linda F.M.*, 418 N.E.2d at 1304.

384. *Id.* (citation omitted). The decision appeared to overrule the procedure used by a surrogate court in an earlier case in which the court, without first requiring a good cause showing, ordered an investigation to locate the birth mother and determine whether she would be willing to see her daughter. See *In re Maxtone-Graham*, 393 N.Y.S.2d 835, 836-37 (Sur. Ct. 1975) (allowing disclosure of agency records where natural mother had consented).

contact birth parents in cases in which good cause was first demonstrated.<sup>385</sup> The Missouri Supreme Court observed that "[i]t is difficult to perceive a case in which circumstances would warrant disclosure . . . unless" the birth parent has waived the confidentiality of the records.<sup>386</sup> Most courts simply weighed the interests of adoptees seeking identifying information against a presumed interest of birth parents in anonymity. The Illinois Supreme Court, for example, in a decision rejecting a constitutional challenge to the state's sealed records laws, found "that the trial court did not abuse its discretion in concluding that [the adoptee's] desire to obtain release of the records should not prevail over the potential infringement of the rights of other parties."<sup>387</sup> In that case, the adoptee's adoptive mother supported his search; his adoptive sister had searched for, found, and was enjoying relationships with both her families; and his adoption had taken place in 1949, twelve years before Illinois closed original birth records to adult adoptees.<sup>388</sup>

The courts also faced the difficult task, with essentially no guidance from state legislatures, of divining what might constitute good cause for revealing information in sealed records. The history and analysis presented in this Article confirm that when many of the record-sealing laws were passed, legislators neither sought to remedy problems associated with adult adoptee access to identifying information nor specifically considered whether or why adult adoptees would seek or should be entitled to information. Some state statutes provided no standard for opening court or birth records; some required "good cause" for court records but enunciated no standard for opening birth records.<sup>389</sup> In the absence of any standard, courts interpreted statutes as requiring good cause.<sup>390</sup> A few statutes supplied other

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385. See, e.g., *Massey*, 369 So. 2d at 1314-15 (finding the right to inherit from blood relative to be compelling reason for a curator ad hoc to investigate birth records, and that birth parents may be indispensable parties); *In re Maples*, 563 S.W.2d at 766 (authorizing a confidential inquiry when factual situation justifies an opportunity to participate anonymously in proceeding); *In re Assalone*, 512 A.2d at 1390 (finding that if adoptee had shown compelling need and connection of psychological problems to lack of information, birth parents must have opportunity to intervene). In New Jersey, a 1977 decision of the superior court, chancery division, outlined a procedure for contacting birth parents in every case, but a later decision of the same court declined to follow the earlier case. *Backes v. Catholic Family & Cmty. Servs.*, 509 A.2d 283, 294 (N.J. Sup. Ct. Ch. Div. 1985) (finding no showing of good cause).

386. *In re Maples*, 563 S.W.2d at 766.

387. *In re Roger B.*, 418 N.E.2d 751, 757 (Ill. 1981) (holding that sealing statute was constitutional because it was rationally related to the legitimate legislative interest of protecting adoption and it did not violate the adoptee's constitutional rights).

388. See *In re Roger B.*, 407 N.E.2d 884, 886, 890 n.7 (Ill. App. Ct. 1980), *aff'd*, 418 N.E.2d 751 (Ill. 1981).

389. See, e.g., *In re Roger B.*, 418 N.E.2d at 752-53; *Backes*, 509 A.2d at 291 n.2.

390. "The statute, unlike those of several other States does not explicitly provide a

types of minimal guidance, such as providing that records may be inspected or information disclosed "only . . . when the court is satisfied that the welfare of the child will thereby be promoted or protected,"<sup>391</sup> or if it is in "the best interest of the child or of the public" to do so.<sup>392</sup> The courts themselves did not develop many more concrete guidelines. As one judge commented, "judicial considerations by other courts as to 'sealed records' statutes are limited and of little help."<sup>393</sup> Another explained that "[t]here is no precise definition of 'good cause' either by statute or case law, rather, the judge must make this determination on a case-by-case basis. Flexibility is desirable in this sensitive area. The court is vested with wide discretion . . ."<sup>394</sup> In keeping with the social understanding that lifelong secrecy is an essential feature of adoption, courts in reported opinions uniformly rejected "mere curiosity,"<sup>395</sup> however keen, and found few specific reasons that did or might constitute good cause. Among the reasons a small number of appellate courts accepted were a psychological need to know,<sup>396</sup> or more commonly, severe psychological problems caused by lack of information;<sup>397</sup> a right to inherit from natural relatives;<sup>398</sup> and a religiously based need to trace ancestors.<sup>399</sup> References to trial court orders that released identifying information can be found in a number of opinions and other sources, but the reasons for and the numbers of such orders cannot be determined.<sup>400</sup>

In the social service arena, there has been discussion since the

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good-cause standard. . . . Although we find no Illinois cases interpreting the standard to be applied, we agree that the discretion conferred by the statute was intended to be exercised upon a showing of good cause." *In re Roger B.*, 418 N.E.2d at 752-53 (citation omitted); see also Harrington, *supra* note 262, at 30 & n.2.

391. *In re Wells*, 281 F.2d 68, 70 (D.C. Cir. 1960) (quoting relevant statute prohibiting inspection of sealed records except upon court's finding that the welfare of child would be protected or promoted).

392. *In re Spinks*, 232 S.E.2d 479, 481 (N.C. Ct. App. 1977) (quoting relevant statute and finding that the best interests of the child were not adequately considered).

393. *Id.* at 482.

394. *Sage*, 586 P.2d at 1206.

395. See, e.g., *Mills*, 372 A.2d at 655; *In re Linda F.M.*, 409 N.Y.S.2d at 642.

396. See, e.g., *Estate of Dodge v. Comerica Bank*, 413 N.W.2d 449, 584 (Mich. Ct. App. 1987) (finding a psychological need entitled adoptee to hearing on issue of opening records).

397. See, e.g., *Assalone*, 512 A.2d at 1388-89.

398. See, e.g., *Massey*, 369 So. 2d at 1314.

399. See *In re Gilbert*, 563 S.W.2d 768, 770 (Mo. 1978) (holding that religious need could be good cause sufficient to open records). For a general discussion of reported and unreported "good cause" cases decided in the 1970s, see Harrington, *supra* note 262. For a discussion of such cases up to the present time, see Karnezis, *supra* note 369.

400. See, e.g., *Rossignol v. Comm'r of Human Servs.*, 495 A.2d 788, 789 (Me. 1985) (denying motion for further inspection after adult adoptee had already ascertained identity of birth mother); Sorosky et al., *supra* note 267, at 151.



1960s about promises or assurances made by agencies to unmarried mothers that identifying information about them would not be revealed in the future to the children they surrendered for adoption. These discussions pertain generally to social workers' professional confidentiality standards and practices with respect to their own records,<sup>401</sup> although it is certainly possible some agencies or other intermediaries had made representations about laws governing court and birth records laws. In a 1975 article, a professor of social work recounted that unmarried mothers did not anticipate that the surrendered child would be re-introduced into her life "at some unpredictable time."<sup>402</sup> Discussing the possibility of agencies providing information in the future to adult adoptees, she continued, "[m]others who have already given their children up for adoption have been given assurances about privacy and confidentiality that must be respected."<sup>403</sup> A 1975 Child Welfare League survey of adoption agencies asked what should be done if a choice had to be made between a "[b]iological mother's right to anonymity" and an "[a]dult adoptee's right to know who was his or her biological mother." Fifty-seven percent of the agencies said they would consider the mother's right paramount, while 27% would consider the adoptee's paramount, and 16% "didn't know." Respondents were more divided on the normative question of whether agencies ideally should conduct a search for biological parents on the adoptee's behalf (14% usually, 53% sometimes, 19% never), or simply give the adoptee identifying information (9% usually, 40% sometimes, and 34% never).<sup>404</sup>

The League's 1978 revision of its standards continued to support sealed adoption records,<sup>405</sup> although by 1988, it was advising agencies to advocate both for laws shifting the burden of proof from adoptees to birth parents and for laws under which adult adoptees could be given information either after birth parents' consent is obtained or after a diligent but unsuccessful search for the birth parents.<sup>406</sup> Then in 2000, recognizing that "[a]doption practice has changed significantly"<sup>407</sup> since the publication of the previous standards, the League

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401. See generally Marianne Bower Blair, *The Uniform Adoption Act's Health Disclosure Provisions: A Model that Should Not Be Overlooked*, 30 FAM. L.Q. 427, 455 (1996).

402. Rita Dukette, *Perspectives for Agency Response to the Adoption-Record Controversy*, 54 CHILD WELFARE 545, 547 (1975).

403. *Id.* at 553.

404. MARY ANN JONES, CHILD WELFARE LEAGUE OF AM., THE SEALED ADOPTION RECORD CONTROVERSY: REPORT OF A SURVEY OF AGENCY POLICY, PRACTICE AND OPINIONS 21-23 (1976).

405. CARP, *supra* note 5, at 175.

406. *Id.* at 194.

407. Child Welfare League of Am., *CWLA Standards of Excellence for Adoption Services*, available at [http://www.cwla.org/programs/adoption/cwla\\_standards.htm](http://www.cwla.org/programs/adoption/cwla_standards.htm) (last

advised agencies to promote policies that provide adopted adults with direct access to identifying information.<sup>408</sup> Twenty years earlier, an advisory panel of the Children's Bureau recommended a model state adoption act under which adult adoptees would have access to birth and court records.<sup>409</sup> After receiving negative comments on the act, including objections to the open records provisions from ninety percent of commenting adoptive parents, the Department of Health, Education, and Welfare promulgated a model act that dealt only with the adoption of children with special needs and did not include the open records provisions.<sup>410</sup> Perhaps social service workers and policymakers have supported greater openness than states have afforded because of those professionals' familiarity with emerging thinking in their fields as well as their direct involvement with adult adoptees, adoptive parents, and birth parents.

State laws passed after the 1960s establishing passive and active registries of course reflect and reinforce the idea that the purpose of lifelong secrecy is to protect birth parents' right to anonymity and that therefore identifying information should not be available to adult adoptees without the consent of the birth parent whose identity will be revealed. In Connecticut, for example, two years after closing birth records to adult adoptees, the legislature created an elaborate system under which an adult adoptee could petition a court for identifying information, and receive such information after an agency investigation and report to the court, if the birth parents gave written consent and if the court did not determine that the release of the information would be "seriously disruptive" or endanger the health of the adoptee or birth parents. If the birth parents could not be found, a guardian ad litem was to be appointed who could consent on their behalf.<sup>411</sup> The recent state laws that have prospectively established access to birth records<sup>412</sup> also reflect the idea that, at least in adoptions completed before or during the period when birth records were closed to adoptees, there is a pre-existing right to lifelong anonymity that must be preserved.

The fact that states have moved so cautiously toward opening birth records, notwithstanding revolutionary social change and the efforts of open records advocates, is likely due in part to the power and persistence of the social understanding about lifelong secrecy

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visited Feb. 15, 2001).

408. *Id.*

409. Model State Adoption Act and Model State Adoption Procedures: Recommendations of the Model Adoption Legislation and Procedures Advisory Panel, 45 Fed. Reg. 10,622, 10,686-89 (Feb. 15, 1980).

410. CARP, *supra* note 5, at 187-88.

411. 1977 Conn. Pub. Acts 77-246.

412. *See supra* note 25.

and its affiliated meanings. The three states that in very recent years have re-established unrestricted access to birth records—Tennessee, Oregon, and Alabama<sup>413</sup>—have responded to open record advocates' arguments that states' passive and active registries are ineffective, demean adult adoptees, and do not remedy the fundamental denial of adoptees' right to the kind of basic information about oneself that is available to all other persons. Reunion rates achieved through state and local passive registries are low, ranging, by one estimate, from a high of 4.4% to a median of 2.05%, with the lack of higher rates attributed to factors such as being "under-funded [and] understaffed."<sup>414</sup> Efforts in the United States Congress to establish a nationwide passive registry have so far been unsuccessful.<sup>415</sup> Beyond the criticism that these registries are ineffective, other objections include the view that both passive and active registries are psychologically unhelpful to the adult adoptee. The systems "abrogate one of the most fundamental principles of social work practice, self-determination. Under such systems the locus of control, which the search serves to remedy, remains outside the adoptee, thereby keeping her in a position of passivity and dependence."<sup>416</sup> In addition, the "assumption that reunions mediated by adoption workers have better outcomes than reunions worked out solely by the adoptee and birth-parent themselves" is criticized as "unsupportable."<sup>417</sup>

Tennessee's and Oregon's open records laws have been challenged and upheld in cases in which opponents have argued that the measures violate federal and state constitutions. The Oregon law, passed as a ballot initiative in 1998, provides that adoptees age twenty-one and older may receive copies of their original birth certificates upon request.<sup>418</sup> Under the law, a birth parent may file a

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413. See *supra* note 23.

414. Troxler, *supra* note 325. For example, in the first twelve years of Illinois's passive registry, there were reportedly only twenty-eight matches. Heidi Hildebrand, *Because They Want to Know: An Examination of the Legal Rights of Adoptees and Their Parents*, 24 S. ILL. U. L.J. 515, 515 n.3 (2000) (citing Adrienne Drell, *Opening the Books on Adoption*, CHI. SUN-TIMES, Apr. 14, 1997, at 6); see also Alan W. Strasser, *Adoption Search and Registry Laws of Vermont and New York: Whose Best Interest Is Being Served?*, 28 SUFFOLK U. L. REV. 669, 708-09 (1994) (discussing the changing societal attitudes toward biological mothers and the supporting laws that facilitate adoptees' searches for their biological families).

415. See *supra* note 12.

416. Schechter & Bertocci, *supra* note 191, at 88.

417. *Id.* The authors recommend that adoptees have personal access to the "information within the context of an encounter with an adopteeadvocate rather than in the context of 'counseling.'" *Id.*

418. See *Doe v. State*, 993 P.2d 822, 825 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000), *stay denied*, 530 U.S. 1228 (2000). The Oregon House of Representatives passed the bill to complement the enactment. H.B. 3194, 70th Leg. Assem., Reg. Sess. (Or. 1999).

"Contact Preference Form" indicating whether the birth parent would like to be contacted, would prefer to be contacted through an intermediary, or would prefer not to be contacted "at this time."<sup>419</sup> The Oregon courts held that under state and federal constitutions, the law neither unconstitutionally impairs the obligation of contract nor invades a guaranteed privacy right.<sup>420</sup> Oregon's adoption laws never "prevented all dissemination of information concerning the identities of birth mothers. At no time in Oregon's history have the adoption laws required the consent of, or even notice to, a birth mother on the opening of adoption records or sealed birth certificates."<sup>421</sup> A birth mother does not have "a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child. . . . Adoption necessarily involves a child that already has been born, and a birth is, and historically has been, essentially a public event."<sup>422</sup> By the time the Oregon litigation was concluded in 2000, more than 2,000 requests for birth records had been filed.<sup>423</sup>

The Tennessee statute, passed in 1995, provides adoptees twenty-one years of age and older with a right of access to birth records, as well as to court and agency records.<sup>424</sup> The law responds to concerns about birth parents' privacy with a "contact veto" mechanism for adoptions that took place after the date on which adult adoptee access to birth records was prohibited. Birth parents and specified other relatives may register their willingness or unwillingness to have contact with an adoptee who obtains his or her records.<sup>425</sup> Contact initiated in violation of a veto is a misdemeanor and subjects the contacting party to a civil suit for injunctive relief and damages.<sup>426</sup> Opponents of the Tennessee law argued unsuccessfully in federal court that the law violates constitutional rights of birth

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419. H.B. 3194, 70th Leg. Assem., Reg. Sess. (Or. 1999).

420. *Does*, 993 P.2d at 833-34.

421. *Id.* at 832. The court also noted that not all birth certificates were sealed, and that whether a certificate would be sealed was up to the adoptive parents, the child, or the court, and not to the birth mother. *Id.* at 832-33.

422. *Id.* at 836.

423. See Editorial, *Adoption Papers; Courts Consistently Rule in Favor of Open Records*, FORT WORTH STAR-TELEGRAM, June 14, 2000, at 10.

424. TENN. CODE ANN. § 36-1-127 (1991).

425. *Id.* §§ 36-1-128 to -129. The contact veto is not available in connection with records existing prior to March 16, 1951, which were not sealed at the time they were created. *Id.* §§ 36-1-127 to -128. When an adoptee obtains records, he must identify persons or classes of persons who are eligible to refuse contact and with whom he wishes to establish contact. "The state then attempts to contact such persons, whether or not they have filed a contact veto, so that they may confirm, vary, or withdraw an already filed veto." If such persons cannot be located after diligent search, then there is no restriction against contact. *Id.* §§ 36-1-130 to -131.

426. *Id.* § 36-1-132.

mothers to familial privacy, reproductive privacy, and the non-disclosure of private information.<sup>427</sup> In subsequent state court litigation, the Tennessee Supreme Court, in 1999, upheld the statute, deciding under the state constitution that the law neither impaired birth mothers' vested rights nor violated their right to privacy.<sup>428</sup> The court noted that early state law did not require sealing records, and that later law permitted disclosure upon "a judicial finding that disclosure was in the best interest of the adopted person and the public," with no requirement that birth parents be notified or have an opportunity to veto contact.<sup>429</sup> The court found that "[t]here simply has never been an absolute guarantee or even a reasonable expectation by the birth parent" that records would never be opened.<sup>430</sup>

## V. CONCLUSION

In sum, adoption law did not proceed in a simple, single step from a period in which court and birth records were closed to the public to a period in which the records were permanently closed to all of the parties. Instead, a more complete and accurate history of the law reveals interim periods, lengthy ones in many states, in which court records were closed to all, while birth records, as recommended by social service and legal authorities, were closed to everyone except the adult adoptees whose births they registered. Laws closing adoption records to the parties were enacted not as a shield to protect birth parents from their adult children's ever learning their identity, but as a sword to prevent them from interfering with the adoptive families raising the children. This rationale was ubiquitous into the 1960s, and it is only later that an additional rationale achieves widespread currency: the rationale of protecting birth parents' lifelong privacy by prohibiting adult adoptees' access to birth records.

The observation that "law is culture"<sup>431</sup> is nowhere more apt than in this history of adoption law. The earliest laws prohibiting adult adoptees' access to birth records reflected not an instrumental goal of protecting birth parents from discovery by adult adoptees but instead

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427. *Doe v. Sundquist*, 106 F.3d 702, 706-08 (6th Cir. 1997).

428. *See Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999).

429. *Id.* at 925.

430. *Id.*

431. Geoffrey P. Miller, *Circumcision: A Cultural-Legal Analysis*, N.Y.U. PUB. L. & LEGAL THEORY (1999), available at <http://www.ssrn.com>. The kind of analysis Professor Miller performed could provide another productive way to examine the history of birth records access. He examined how the legal and cultural meaning of circumcision has changed from the late nineteenth century through the present. He used a set of polarities around which our culture's concept of the good is organized: purity and pollution, health and harm, self and others, natural and unnatural, beauty and deformity, gender-appropriate and gender-inappropriate, order and chaos, good and bad, and true and false.

a social understanding of adoption as a perfect and complete substitute for creating a family by childbirth. As a widespread legal regime of partial secrecy developed—with court records sealed and birth records closed to all except adult adoptees—negative social meanings became attached to adult adoptee interest in birth families, and the understanding became firmly established that lifelong secrecy was an essential feature of adoptions in which the birth and adoptive parents did not know one another. The potency of this understanding was apparent from the 1960s onward, when it was increasingly threatened by radical social change. The understanding itself and the social meanings associated with it were increasingly discounted and were directly challenged by the individual actions and group advocacy of adoptees and birth parents. At the same time, in defensive constructions of the understanding and meanings, adoptees' interest in birth families came to be seen as being in conflict with birth parents' right to or guarantee of lifelong anonymity, and a substantial minority of states moved to extinguish adult adoptees' legal right to access birth records.

It is no wonder that to many adoptees and birth parents the law has seemed painfully incongruent with experience. Those adoptees who have sought and been unable to obtain identifying information, either through a variety of private channels or through public registries, have felt acutely the stern social opprobrium of sealed birth records laws. Birth parents who have supported adoptees' opposition to closed records have felt, understandably in light of the history recounted here, that lifelong anonymity was a harsh consequence of their circumstances rather than a benevolently bestowed protection. The pain caused by having one's deepest feelings met with official censure is conveyed by open records advocates' quotation of a florid but fervent statement by a government authority. In an unpublished trial court decision reversed by the South Carolina Supreme Court, the judge wrote:

The law must be constant with life. It cannot and should not ignore broad historical currents of history. Mankind is possessed of no greater urge than to try to understand the age-old questions: "Who am I?" "Why am I?" Even now the sands and ashes of the continents are being shifted where we made our first steps as man. Religions of mankind often include ancestor worship in one way or another. For many, the future is blind without a sight of the past. Those emotions and anxieties that generate our thirst to know the past are not superficial and whimsical. They are real and they are "good cause" under the law of man and God.<sup>432</sup>

Although the movement of the states toward greater openness

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432. *Bradey v. Children's Bureau*, S.C. Ct. Com. Pl., Apr. 9, 1979, *quoted in Harrington*, *supra* note 262, at 38.

has been slow and cautious, it has been nationwide and its pace has been accelerating sharply in recent years.<sup>433</sup> The numerous passive and active registries are being supplemented or supplanted by the growing number of states opening all records, re-opening records not closed at their inception, opening records prospectively, or opening all or some records subject to disclosure vetoes by birth parents. These changes both reflect and foster the difficult process of deconstructing lifelong secrecy. It may be expected that one day the number of states opening birth records will reach a critical "tipping point,"<sup>434</sup> a point after which a majority of states will reject lifelong secrecy as expeditiously as they once embraced it.

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433. The trend toward more open birth records represented by the laws described and cited in this Article is not negated by a recent rash of "safe haven" or "Baby Moses" laws, designed to address the small number of cases nationwide in which newborn babies are abandoned and often die as a result. These laws typically provide for a parent of a newborn to leave the child anonymously at designated locations. As of the fall of 2000, fourteen states had passed such laws and approximately twelve others had considered doing so. These laws have been criticized on the ground that the children will never be able to learn the identity of their parents or information about their medical histories. See Michael S. Raum & Jeffrey L. Skaare, *Encouraging Abandonment: The Trend Towards Allowing Parents to Drop Off Unwanted Newborns*, 76 N.D. L. REV. 511 (2000); Jacqueline L. Salmon, *For Unwanted Babies, a Safety Net; More States Offer "Havens" to Deter Abandonment, but Critics Abound*, WASH. POST, Oct. 20, 2000, at A1.

434. See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000) (analyzing the spread of social phenomena from a mathematical perspective).